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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 15

A. S. ALEXANDER, H. D. RUMMEL AND GEORGE S. BATON, AS RECEIVERS, ETC., PETITIONERS,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 1, 1935.

CERTIORARI GRANTED MAY 6, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 15

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON

No. 1434. In Equity

PIEDMONT COAL COMPANY, a Corporation Created and Existing under the Laws of the Commonwealth of Pennsylvania, and G. S. Harah, Edgar S. Hackney and J. E. Hess, the Three Individuals Residing in the City of Uniontown, County of Fayette, and Commonwealth of Pennsylvania, and All the Plaintiffs Being Citizens of Said Commonwealth and Domiciled in the Western District Thereof,

vs.

TOWER HILL CONNELLSVILLE COKE COMPANY OF WEST VIRGINIA, a Citizen of the State of West Virginia, Domiciled in the Southern District Thereof

ORDER OF REFERENCE, ETC.—Dec. 12, 1933

[fol. 2] On this day this cause came on to be heard at this term upon notice heretofore given, and thereupon came the plaintiffs by their attorneys, and likewise came the defendant by its attorney, and the Receivers heretofore appointed herein by their attorney, and it appeared to the Court that this cause involves matters of accounts, and it having been shown that exceptional conditions herein within the meaning of Federal Equity Rule 59 require a reference, it is ordered, adjudged and decreed that this cause be, and the same is hereby referred to J. E. Campbell, Esq., of the City of Charleston, West Virginia, as Special Master (the said Campbell being suggested by counsel for plaintiffs and defendant as a proper person for such appointment, it being understood that this shall not be regarded as a consent decree by reason of such suggestion), to take, state and report an account and report to the Court showing:

(1) All the debts, obligations and claims against the said defendant, Tower Hill Connellsville Coke Company of West Virginia, the nature, amount and respective priorities thereof, together with any interest that may have accrued

thereon, and whether or not any one or more of said debts are secured by liens upon property of the defendant or otherwise secured, and the validity and character of such security, and any property subject to such liens, and the persons, firms and corporations, with their addresses, who are respectively owners or holders of, or assert claims with respect to, said debts, obligations and claims;

(2) The owners of the preferred stock of said Tower Hill Connellsville Coke Company of West Virginia, together with their addresses so far as obtainable, the number of shares held by each of them, and the dividends accumulated and unpaid thereon;

(3) The owners of all the common stock of said Tower Hill Connellsville Coke Company of West Virginia, including their names and addresses so far as obtainable and the number of such shares held respectively by them; and

(4) Such other matters as any party in interest may require, the same being pertinent, or such other matters as said Master himself may deem pertinent, whether so required or not.

[fol. 3] The said Special Master shall have power to compel the attendance of, and to administer oaths to, witnesses, and shall have all powers and authorities set forth in United States Equity Rule 62, and is hereby authorized to employ stenographic and clerical assistance.

Before proceeding the said Special Master shall give notice to all parties to this cause, and to all claimants, creditors, and all persons claiming to be creditors, and to all preferred stockholders and to all common stockholders of Tower Hill Connellsville Coke Company of West Virginia, a corporation, defendant herein, of the time and place of the hearing of the matters hereby referred to him, by publication once each week for four successive weeks (a period of at least twenty-eight days to elapse between the first publication thereof and the commencement of said hearing), in The Charleston Daily Mail, a newspaper of general circulation published in the City of Charleston, County of Kanawha, State of West Virginia, and in the Pittsburgh Post-Gazette, a newspaper of general circulation published in the City of Pittsburgh, County of Allegheny, State of Pennsylvania. In addition to said publi-

cation said Special Master shall give due notice of said hearing to each of the parties to this cause, or their solicitors, as required by Equity Rule 60, and to the Receivers of the defendant, Tower Hill Connellsville Coke Company of West Virginia, or to their solicitors. Said Special Master shall have the right, without further notice, to adjourn said hearing from time to time.

It is further ordered that when the said Special Master shall fix the time and place of hearing as aforesaid, the Receivers heretofore appointed in this cause shall mail a copy of the notice of such hearing to all the creditors and stockholders of the defendant, Tower Hill Connellsville Coke Company of West Virginia as the same appear from any books of the defendant Corporation that may be in their hands, but the failure of the Receivers so to do shall not invalidate any proceeding of said Special Master and shall not invalidate or affect any hearing so long as notice by publication be given as hereinbefore directed.

The said Special Master shall report in writing to this Court, for its further action, his findings and conclusions, [fol. 4] in accordance with this decree, and shall accompany his report by all papers and documents filed before him, and by a transcript of all evidence taken and filed before him.

The Court doth reserve the right, pending said reference, to enter all proper orders and decrees in this cause.

It further appearing to the Court that there is pending in the United States District Court for the Western District of Pennsylvania, in an equity cause entitled A. S. Alexander, H. D. Rummel and George S. Baton, Receivers, versus Tower Hill Connellsville Coke Company of West Virginia, et al., being a proceeding of a nature ancillary to this cause, it is ordered that the Receivers heretofore appointed herein do tender to file a certified copy of this decree in said Court to the end that the Judges of said Court may be advised hereof.

IN UNITED STATES DISTRICT COURT

PROOF OF CLAIM OF HECLA COAL & COKE COMPANY AS THE OWNER OF SHARES OF THE PREFERRED STOCK AND THE COMMON STOCK OF THE TOWER HILL CONNELLSVILLE COKE COMPANY OF WEST VIRGINIA

In Equity

No. 1434

[Title omitted]

To J. E. Campbell, Special Master in Chancery in the above proceedings:

In compliance with the notice given by you under date of December 26, 1933, Hecla Coal & Coke Company, a corporation under the laws of the State of Pennsylvania, having its office and principal place of business in the First National Bank Building, City of Pittsburgh, Allegheny County, Pennsylvania, files this its proof of claim with you, for the purpose of participating in any distribution or liquidating dividend paid by the Tower Hill Connellsville Coke Company of West Virginia or the Receivers thereof, to either its Preferred or its Common stockholders or to both.

[fol. 5] The Tower Hill Connellsville Coke Company of West Virginia has issued the following certificates for shares of its Preferred stock to this claimant, Hecla Coal & Coke Company:

Date.	Certificate No.	Shares.
Apr. 3, 1924	A 522	25
Feb. 16, 1925	A 526	110
Dec. 31, 1928	A 528	380
Dec. 27, 1929	A 529	50
Aug. 13, 1930	A 530	240
Oct. 15, 1930	A 531	24
Nov. 26, 1930	A 532	33
Dec. 31, 1930	A 533	1,117
Dec. 31, 1931	A 534	48
Dec. 28, 1932	A 536	10
Total		2,037

(6) The Tower Hill Connellsville Coke Company of West Virginia has issued the following certificates for shares of its Common stock to this claimant, Hecla Coal & Coke Company:

Date.	Certificate No.	Shares
Nov. 16, 1926	B 1118	1,641
Dec. 31, 1926	B 1119	15
Apr. 14, 1927	B 1123	13
July 14, 1927	B 1126	110
Oct. 13, 1927	B 1127	50
Dec. 21, 1927	B 1129	33
Apr. 13, 1928	B 1131	12
July 14, 1928	B 1132	34
Dec. 31, 1928	B 1136	6
Apr. 26, 1929	B 1138	13
Dec. 27, 1929	B 1140	33
Apr. 14, 1930	B 1142	19
July 15, 1930	B 1143	13
Aug. 13, 1930	B 1145	6
Oct. 15, 1930	B 1152	29
Nov. 26, 1930	B 1154	123
Dec. [illegible], 1930	B 1162	247
Dec. 31, 1931	B 1170	54
Total		2,451

[fol. 6] The originals of said stock certificates will be exhibited to you by the claimant, Hecla Coal & Coke Company, for inspection and examination by you at any time which you may designate.

Hecla Coal & Coke Company, by A. B. Sheets, Vice-President. (Corporate Seal.)

Attest:

Thos. Watson, Secretary.

Duly sworn to by A. B. Sheets. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

No. 1434. In Equity

[Title omitted]

Proof of Claim of Thomas Watson

To J. E. Campbell, Special Master in Chancery in the above proceedings:

[fol. 7] In compliance with the notice given by you under date of December 26, 1933, Thomas Watson, an attorney at law, having his office in the First National Bank Building in the City of Pittsburgh, Allegheny County, Pennsylvania, files with you his Proof of Claim against the Tower Hill Connellsville Coke Company of West Virginia in the sum of $33,750.00. The nature of this claim is as follows:

1. The claimant was employed as Secretary of the Tower Hill Connellsville Coke Company of West Virginia at a salary of $250.00 per month. Claimant discharged all of his duties as Secretary of said corporation from October 1, 1933, until on or about October 26, 1933, at which time the assets of the corporation were turned over to its receivers, and the management of the corporation's affairs was taken out of the hands of its executive officers.

2. On or about November 3, 1924, the plaintiffs herein filed their bill in equity against Tower Hill Connellsville Coke Company of West Virginia as defendant in the above proceedings. At or about this time the claimant was employed by Tower Hill Connellsville Coke Company, together with other attorneys, to represent the defendant in said proceedings. The claimant assisted in the drafting of the Defendant's Original Answer and the preparation of the case for trial. The claimant conducted the trial of said case upon behalf of the defendant, examining witnesses, and arguing the case before the District Court, assisting in the preparation of various briefs filed by the defendant with the District Court prior to the entry by said District Court of its Memorandum Opinion bearing date of April 5, 1928.

Claimant further assisted in the preparation of a petition to the United States Circuit Court of Appeals for the Fourth Circuit from the decree entered in these pro-

ceedings by the District Court under date of July 8, 1929. Claimant further assisted in the preparation of the record on appeal to the United States Circuit Court and in the preparation of the briefs prepared and filed by the defendant. Claimant assisted in the argument of the case before the United States Circuit Court of Appeals. Claimant further assisted in the preparation of a petition for a re-argument and brief in support thereoof which were filed with the Circuit Court of Appeals for the Fourth [fol. 8] Circuit after it had rendered its decision dated July 8, 1929.

Claimant further assisted in the preparation of the Answers filed by the defendant to the Plaintiffs' Amended and Supplemental Bill and the Plaintiffs' Second Amended and Supplemental Bill and in the preparation of the case for trial at the hearing commenced upon November 11, 1931. Claimant assisted in the examination of witnesses and in the argument of the case before the District Court. Claimant further assisted in the preparation of the briefs on behalf of the defendant with this District Court in said proceedings. Claimant further assisted in the preparation of an appeal to the United States Circuit Court of Appeals from the decree entered upon August 25, 1932, by the District Court in these proceedings, and in the preparation of the record on appeal including briefs on behalf of the defendant.

Claimant further assisted in the preparation of a Petition for Writ of Certiorari to the Supreme Court of the United States to review the decision of the Circuit Court of Appeals for the Fourth Circuit rendered upon April 22, 1933, including the preparation of brief accompanying said petition for writ of certiorari.

In the opinion of the Claimant, the fair and reasonable value of the services performed by him as aforesaid at the instance and request of the Tower Hill Connellsville Coke Company of West Virginia is the sum of $25,000, for which amount Claimant asks that his claim be allowed.

3. During the year 1920 Claimant was employed by Tower Hill Connellsville Coke Company of West Virginia to represent it as its attorney before the Bureau of Internal Revenue in the determination and adjustment of its Income and Excess Profits Taxes and other Federal taxes for the year- 1917, 1918, 1919 and 1920. From the time of

Claimant's first employment by the defendant in the year 1920 and continuing down to the year 1933, the federal taxes of the defendant corporation and of its two subsidiaries Tower Hill Connellsville Coke Company of Pennsylvania and Eastern Coke Company have been in course of settlement, adjustment and litigation.

For the year 1917 the Commissioner of Internal Revenue asserted a deficiency of taxes against the Defendant and [fol. 9] Tower Hill Connellsville Coke Company of Pennsylvania in the amount of $498,000.00. This amount represented a tax liability determined by the Commissioner of Internal Revenue over and above the tax liability shown by the Defendant and Tower Hill of Pennsylvania on their consolidated Income and Excess Profits Tax return for the year 1917. After numerous hearings and conferences in Washington, D. C., with the Bureau of Internal Revenue, it was determined that the correct tax liability of the defendant and of Tower Hill Connellsville Coke Company of Pennsylvania was $178,000.00 in excess of the amount shown upon the consolidated tax return of said corporation for the year 1917. The services rendered by this claimant were thus instrumental in effecting for the defendant and Tower Hill of Pennsylvania a saving of $320,000.00 in taxes, together with $80,000.00 which would have been the approximate interest on said $320,000.00 up to the date of settlement. Thus the total tax saving for the year 1917 was $400,000.00.

Upon the basis of depreciation, depletion, invested capital, war profits, etc., used by the Commissioner of Internal Revenue in determining the aforesaid deficiency of $498,000.00 in the taxes of the defendant and of Tower Hill of Pennsylvania for the year 1917, there would have been a deficiency of $900,000.00 in the tax liability of Defendant and of Tower Hill of Pennsylvania for the years 1918, 1919 and 1920. The correct tax liability of said corporation for the years 1918, 1919 and 1920 was determined by the Commissioner of Internal Revenue to be $495,000.00. Upon this basis, the services of the claimant have been instrumental in effecting a tax saving of $405,000.00 for said years 1918, 1919 and 1920.

The tax liability of said corporations for the year 1920 as determined by the Commissioner of Internal Revenue is contested by said corporations. They have filed a petition with the United States Board of Tax Appeals seeking to

have the tax deficiency asserted against them by the Commissioner of Internal Revenue re-determined and reduced. This case is now pending before the United States Board of Tax Appeals.

Claimant has also instituted proceedings in the District Court of the United States for the Western District of Pennsylvania for the recovery of $145,000.00 of taxes paid by the Defendant, together with interest thereon amounting to $39,000.00, making a total of $184,000.00. This case is pending and undetermined.

[fol. 10] In the opinion of the Claimant, the fair and reasonable value of the services performed by him as aforesaid at the instance and request of Tower Hill Connellsville Coke Company of West Virginia and its Pennsylvania subsidiary in connection with their Federal Income and Excess Profits tax matters is the sum of $40,000, for which amount Claimant asks that his claim be allowed.

Defendant and Tower Hill Connellsville Coke Company of Pennsylvania have made the following payments to this claimant upon account of his services as hereinabove set forth:

February 12, 1927	$ 5,000.00
February 23, 1927	5,000.00
July 28, 1927	6,000.00
October 17, 1927	5,000.00
June 25, 1931	8,000.00
May 12, 1932	2,500.00
Total payments	$31,500.00

The following is a statement of the Defendant's account with this Claimant:

Salary, October, 1933	$ 250.00
Services in litigation with the Piedmont Coal Company et al., as above set forth	25,000.00
Services in connection with Federal Income Tax matters as above set forth	40,000.00
Total	$65,250.00
Credits by cash received, as hereinabove set forth	31,500.00
Balance Due	$33,750.00

Claimant respectfully asks that his claim as above set forth may be allowed against the Defendant Tower Hill Connellsville Coke Company of West Virginia.

Thomas Watson.

[fol. 11] *Duly sworn to by Thomas Watson. Jurat omitted in printing.*

In United States District Court

Proof of Claim of Hillman Coal & Coke Company

No. 1434. In Equity

[Title omitted]

To J. E. Campbell, Special Master in Chancery in the above proceedings:

In compliance with the notice given by you under date of December 26, 1933, Hillman Coal & Coke Company, a corporation under the laws of the State of Pennsylvania, having its office and principal place of business in the First National Bank Building, in the City of Pittsburgh, Allegheny County, Pennsylvania, files with you its Proof of Claim against the Tower Hill Connellsville Coke Company of West Virginia in the amount of $2,720.03. The nature of this claim is as follows:

Commencing in the year 1920, Tower Hill Connellsville Coke Company of Pennsylvania, which held title to and operated the mines in Fayette County, Pennsylvania, now owned by Tower Hill Connellsville Coke Company of West [fol. 12] Virginia, entered into an agreement with the Hillman Coal & Coke Company, Hecla Coal & Coke Company, Thompson Connellsville Coke Company, and other associated and affiliated companies, engaged in the mining of coal, the manufacture of coke and the sale of coal and coke, under which agreement said companies would maintain a joint operating department, a joint engineering department, a joint general office in the City of Pittsburgh, and joint sales offices in Pittsburgh, Philadelphia and New York. It was agreed that the expenses of the foregoing departments would be incurred in the name of the Hillman

Coal & Coke Company, which acted as the Pool Manager. The other corporations parties to said agreement undertook to pay their pro-rata share of said joint expense.

By agreement between Tower Hill Connellsville Coke Company and the other interested companies, the expenses of the general office department and the operating department have at all times been apportioned to the individual mines of the various companies upon the basis of each mine's monthly output, with the proviso, however, that from time to time a schedule of prescribed minimum tonnages was set up for each mine, based upon a fixed, uniform percentage of the normal monthly output of said mines.

During the month of October, 1933, the general office expense for said consolidated group was $15,075.38, consisting of the following items:

Advertising	$ 62.50
Welfare Work	300.00
Credit Information & Collection Expense	125.00
Miscellaneous Office Expense	173.39
Office Supplies & Stationery	333.80
Postage	218.38
Rent	1,383.34
Salaries	11,669.82
Telephone & Telegrams	1,371.82
Expense Accounts	734.08
Depreciation	421.00
Membership Dues	288.50
Automobile Expense & Depreciation	174.33
Maintenance & Repairs to Equipment	8.78
Insurance Workmens Compensation	10.64
	$17,275.38
[fol. 13] Less Fixed charges not applicable to Pool Account	2,200.00
	$15,075.38

During the month of October, 1933, the operating department expenses of said consolidated group were $4,516.79,

consisting of the following items, all of which charges were applicable to the pool account:

Miscellaneous Office Expense	$ 60.66
Office Sup-lies and Stationery	13.66
Rent	353.00
Salaries	3,800.75
Expense Accounts	181.92
Membership Dues	7.50
Automobile Expense & Depreciation	6.72
Insurance Workmen's Compensation	46.02
Field Supplies	60.00
Total	$4,516.79

During the month of October, 1933, the Engineering Department expenses of said consolidated group were $2,464.28, consisting of the following items:

Miscellaneous Office Expense	$ 76.67
Office Sup-lies and Stationery	19.84
Rent	312.00
Salaries	1,916.65
Expense Accounts	54.83
Automobile Expense & Depreciation	68.41
Maintenance & Repairs to equipment	1.25
Insurance Workmens Compensation	12.37
Field Supplies	2.26
	$2,464.28
Less charges not applicable to Pool Account	483.10
	$1,981.18

By agreement between Tower Hill Connellsville Coke Company and the other interested companies, Engineering costs were apportioned as follows:

Each mine was charged with the actual time cost of work done specifically for that mine, and each mine was [fol. 14] charged with that portion of all overhead expenses as was represented by the ratio of the direct time charge of said mine to the total time charges of all mines in that month.

In accordance with the agreement between Tower Hill Connellsville Coke Company and the other interested com-

panies as above stated, Tower Hill Connellsville Coke Company's proportion of the general expenses of said joint operation for the month of October, 1933, was as follows:

General Office Expense	$1,995.35
Operating Department Expense	610.96
Engineering Services	113.72
Total	$2,720.03

All of the assets of the defendant Tower Hill Connellsville Coke Company of West Virginia passed into the possession of its receivers on or about October 26, 1933, and consequently the above items remained due, owing and unpaid. This claimant Hillman Coal & Coke Company has been obliged to pay said items representing the proportion of the joint expenses as above enumerated which Tower Hill Connellsville Coke Company of West Virginia had agreed to pay.

Hillman Coal & Coke Company. By W. L. Affelder, Vice-President. By J. M. Leithead, Ass't Treasurer.

(Corporate Seal.)

Attest:
Thos. Watson, Secretary.

[fol. 15] *Duly sworn to by W. L. Affelder et al. Jurat omitted in printing.*

In United States District Court.

No. 1434. In Equity

[Title omitted]

Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets as Sureties Upon the Supersedeas Bond of Tower Hill Connellsville Coke Company

To J. E. Campbell, Special Master in Chancery in the above proceedings:

In compliance with the notice given by you under date of December 26, 1933, J. H. Hillman, Jr., and A. B. Sheets,

both residents of Pittsburgh, Allegheny County, Pennsylvania, file with you their Proof of Claim of a contingent liability against the Tower Hill Connellsville Coke Company of West Virginia.

1. Upon August 25, 1932, the District Court entered a decree in the above proceedings which provided in paragraph 2 thereof as follows:

"That the business and affairs of Tower Hill Connellsville Coke Company of West Virginia, Defendant in this [fol. 16] cause, be terminated and wound up; that its properties and assets be sold and converted into money; and that distribution thereof be made to its creditors and stockholders according to their respective rights and priorities."

2. Said decree entered August 25, 1932, further provided in Paragraph 7 thereof as follows:

"That Defendant having indicated its intention to appeal to the United States Circuit Court of Appeals for the Fourth Circuit, the operation of this decree shall be suspended for the period of thirty days from the date of the entry hereof to enable the Defendant to perfect such appeal and, in accordance with the Stipulation and Agreement mentioned in the preceding paragraph hereof, the supersedeas bond on such appeal is fixed at one hundred thousand ($100,000.00) dollars, with the sureties and security provided in said Stipulation and Agreement; and likewise in accordance with said Stipulation and Agreement, it is ordered that the status of Defendant's properties, assets, liabilities and business be maintained and preserved in the manner and for the time provided in said Stipulation and Agreement."

3. There was filed with the decree entered August 25, 1932, a written Stipulation and Agreement between the plaintiffs and the defendant, which said Stipulation and Agreement was directed by said decree to be filed as a part of the record in the case, and to be included in the transcript of the record upon appeal. Said Stipulation and Agreement provided in Paragraph First as follows:

"Defendant's supersedeas bond upon its appeal to the United States Circuit Court of Appeals for the Fourth Circuit shall be in the sum of one hundred thousand ($100,000.00) dollars, conditioned as provided by the Act of Con-

gress. The sureties upon said bond shall be J. H. Hillman, Jr., and A. B. Sheets, of Pittsburgh, Pennsylvania, who shall deposit, or cause to be deposited, with The Central Trust Company, at Charleston, West Virginia, listed securities approved by attorneys for Plaintiffs or by this Court, of a market value at the time of deposit of not less than one hundred thousand ($100,000.00) dollars, as col- [fol. 17] lateral security to guarantee the punctual payment and discharge of such liability, if any, as said securities or either of them, may incur under or by reason of said bond, none of said securities to be the property of Defendant, and the instrument effecting such deposit to be in such form and to contain such provisions as shall be approved by attorneys for Plaintiffs or by this Court."

4. Tower Hill Connellsville Coke Company of West Virginia, Defendant in said proceedings, duly perfected its appeal to the United States Circuit Court of Appeals for the Fourth Circuit, and in connection therewith said defendant executed a supersedeas bond in the sum of $100,000.00, conditioned as provided by the Act of Congress. The said defendant executed said bond as principal, and these claimants, J. H. Hillman, Jr., and A. B. Sheets, of Pittsburgh, Pennsylvania, executed said supersedeas bond as sureties.

5. These claimants further complied with the provisions of the aforesaid First Paragraph of the Stipulation and Agreement by depositing listed securities, approved by attorneys for Plaintiffs, having a market value at time of deposit of not less than $100,000.00, as collateral security to guarantee the punctual payment and discharge of such liability, if any, as said sureties, or either of them, might incur under or by reason of said bond.

6. The securities deposited aforesaid by these claimants with The Central Trust Company at Charleston, West Virginia, as collateral security to guarantee the punctual payment and discharge of the liability, if any, of these claimants as said sureties for the defendant, Tower Hill Connellsville Coke Company of West Virginia, were as follows:

Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938

No. A00001441—With October 15, 1932, and A. S. C. A.		$5,000.00

United States Treasury 3⅛% Bonds of 1946-1949

No. 20407H	$10,000.00	
18517H	10,000.00	
[fol. 18]		
19782B	10,000.00	
15447H	10,000.00	
34062B	10,000.00	
12787H	5,000.00	
4407H	5,000.00	
6403C	5,000.00	
18568J	5,000.00	
4744D	5,000.00	
15111A	5,000.00	
92433C	1,000.00	
92434D	1,000.00	
92435E	1,000.00	
92436F	1,000.00	
92437H	1,000.00	
92438J	1,000.00	
92439K	1,000.00	
92440L	1,000.00	
92441A	1,000.00	
92442B	1,000.00	
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92446F	1,000.00	
92447H	1,000.00	
92448J	1,000.00	
92449K	1,000.00	
21483C	1,000.00	
85589K	1,000.00	
85590L	1,000.00	$100,000.00
With December 15, 1932, and all subsequent coupons attached		$105,000.00

None of the aforesaid securities are or ever were the property of Tower Hill Connellsville Coke Company of West Virginia.

6. The United States Circuit Court of Appeals for the Fourth Circuit affirmed the decree of the District Court entered upon August 25, 1932; and the Supreme Court of the United States refused the defendant's petition for a writ of certiorari to review the decision of said Circuit Court of Appeals for the Fourth Circuit.

7. Upon October 26, 1933, the officers of the defendant, Tower Hill Connellsville Coke Company of West Virginia, [fol. 19] in compliance with the decree of the District Court, paid to the receivers appointed to liquidate the assets of the defendant, all the cash in defendant's possession, amounting to the sum of $881,049.42, and further turned over and delivered to the said receivers all the stock, warrants, debentures, notes, agreement for royalties receivable, and other items of personal property, and furthermore delivered to said receivers possession of the lands, plants and equipment of the defendant, constituting its mines and coke operations in Fayette County, Pennsylvania.

8. That the assets in the hands of the receivers of the defendant are ample and sufficient in amount and value to immediately pay and discharge all of the liabilities of the defendant, including any damages and costs which the plaintiffs are entitled to recover from the defendant corporation upon the aforesaid supersedeas bond, leaving a substantial balance available for distribution to defendant's stockholders. It thus appears that the defendant or its receivers are in position to comply with defendant's obligation as the principal obligor upon said surety bond, to protect, indemnify and save harmless these claimants, from any and all liability as sureties upon the aforesaid supersedeas bond.

9. That Claimants through their attorneys have requested the plaintiffs to consent to the entry of an order in the above case by the District Judge, releasing and discharging these Claimants from all liability as sureties upon the aforesaid supersedeas bond of the defendant, and further authorizing, directing and empowering The Central Trust Company, at Charleston, West Virginia, to surrender, turn over and deliver to these claimants the securities hereinbefore enumerated in paragraph "6" hereof.

But the plaintiffs have refused to consent to the entry of such order as requested, and have indicated to claimants that it is the intention of the plaintiffs to assert liability against the claimants as sureties upon said supersedeas bond.

10. That the District Court of the United States for the Southern District of West Virginia has not up to this time been called upon to determine, and has not determined that there is any liability whatsoever upon said supersedeas bond, or that said liability should fall upon these claimants [fol. 20] and not upon Tower Hill Connellsville Coke Company of West Virginia as the principal obligor upon said supersedeas bond, or that the securities deposited by these claimants with The Central Trust Company, at Charleston, West Virginia, should not be returned to these claimants but should be sold and the proceeds applied to the discharge of the liability of these claimants as sureties upon said supersedeas bond.

11. That these claimants without admitting liability as sureties upon said supersedeas bond, and without prejudice in any manner to their right to contest any liability upon the supersedeas bond, but for the purpose of preserving their rights in the premises, pending the decision by the District Court of the United States for the Southern District of West Virgiia, hereby file their Proof of Claim against Tower Hill Connellsville Coke Company of West Virginia and its assets in the hands of its receivers, in the sum of $105,000.00, or any other amount which these claimants may be compelled to pay as sureties upon the supersedeas bond of the defendant. These claimants as sureties assert their rights to be protected, indemnified and saved harmless from any and all liability upon said supersedeas bond by Tower Hill Connellsville Coke Company of West Virginia, which is the principal obligor upon said bond.

12. In the event it is ultimately adjudicated that these claimants are not liable upon said supersedeas bond, and in event they are properly discharged and released from liability as sureties, and in event the securities enumerated in paragraph "6" hereof are returned to these claimants, then and in such event these claimants will withdraw any

and all claim hereon or hereunder against the defendant corporation.

J. H. Hillman, Jr., by Thos. Watson, Atty. A. B. Sheets.

[fol. 21] *Duly sworn to by A. B. Sheets. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

No. 1434. In Equity

[Title omitted]

ORDER FILING ANCILLIARY BILL OF COMPLAINT ETC.—Feb. 19, 1934

This day came H. D. Rummell, A. S. Alexander and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, heretofore appointed herein, by counsel, and tendered and asked leave to file their Ancillary Bill of Complaint against J. H. Hillman, [fol. 22] Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, and upon consideration thereof, it is ordered:

1. That said Ancillary Bill of Complaint be, and hereby it is filed in this Court, with leave to the Defendants to move to dismiss, answer, or make such other defense thereto as may be proper, and for convenience the Clerk be, and hereby he is directed to give it a separate number but that it and all proceedings pursuant thereto shall be ancillary to this cause.

2. That each of said parties named as Defendants in said Ancillary Bill be, and hereby he or it is required to move to dismiss or to file his or its answer or other defense to said Ancillary Bill in the Clerk's office on or before March 19, 1934.

3. That the Receivers be, and hereby they are directed to cause a true and correct copy of this order and of said Ancillary Bill, certified by the Clerk, to be inserted in envelopes addressed to the following respective parties: J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal

and Coke Company and Hecla Coal and Coke Company, each at First National Bank Building, Pittsburgh, Pennsylvania, and each such envelope to be properly stamped and registered and to be deposited in the United States mail at Charleston, West Virginia, on or before February 20, 1934, and on or before said latter date a copy of this order and of said Ancillary Bill, likewise certified by the Clerk, to be delivered at the office of E. W. Knight, Esq., in Charleston, West Virginia.

4. All questions as to the jurisdiction of this Court and other questions are reserved by this Court for future decision as such question may arise, and nothing is herein decided except that the bill shall be filed and notice thereof be had as directed above.

[fol. 23] IN UNITED STATES DISTRICT COURT

MOTION TO VACATE ORDER OF COURT ENTERED FEBRUARY 19, 1934, AND TO QUASH SERVICE OF SAID ORDER AND OF THE BILL OF COMPLAINT THEREIN MENTIONED—Filed March 19, 1934

No. 1434. In Equity

[Title omitted]

To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

Appearing specially for the purpose of making this motion and not intending to submit himself or itself to the jurisdiction of this Court but solely for the purpose of questioning such jurisdiction come J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, each by his or its counsel, and move the Court to vacate its order entered at the above Number in Equity on February 19, 1934, and to quash the service of the said order and of the Ancillary Bill of Complaint therein mentioned and filed at No. 3370 in Equity of this Court in which cause A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of said Tower Hill Connellsville Coke Company of West Virginia,

are plaintiffs and the said J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company are defendants, because

[fol. 24] (a) At the time of the entry of the said order, the filing of the said Ancillary Bill and the alleged service thereof upon each of the defendants and ever since said date no one of the defendants was or is a citizen or resident or inhabitant of or to be found within or was doing business within the Southern District of West Virginia, or anywhere within the State of West Virginia.

(b) The said J. H. Hillman, Jr., A. B. Sheets and Thomas Watson were at the time of the filing of this suit and always since have been each a citizen and inhabitant of the Commonwealth of Pennsylvania and a resident of the City of Pittsburgh, Allegheny County, in said Commonwealth. Hillman Coal and Coke Company and Hecla Coal and Coke Company is each a corporation incorporated and existing under the Laws of the Commonwealth of Pennsylvania, having its domicile in the City of Pittsburgh, in said Commonwealth and is a citizen, resident and inhabitant of said Commonwealth within the purview of Section 51 of the Judicial Code of the United States with respect to venue.

(c) Your Honorable Court is without jurisdiction over any of the said individuals, or either of the said corporations named as parties defendant in the said Ancillary Bill of Complaint. Neither the alleged mailing to each of them in the manner set forth in the said order of court entered February 19, 1934, of a copy of the said order and of a copy of the said Ancillary Bill of Complaint therein referred to, nor the alleged delivery of such copies at the office of E. W. Knight, Esq., Charleston, West Virginia, constitute service upon the defendants named in the said Ancillary Bill of Complaint.

E. W. Knight, Brown, Jackson & Knight, Alter, Wright and Barron, Attorneys for J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company appearing specially for the sole purpose aforesaid.

[fol. 25] IN UNITED STATES DISTRICT COURT

No. 1434. In Equity

PIEDMONT COAL COMPANY, a Corporation Created and Existing under the laws of the Commonwealth of Pennsylvania, and G. S. Harah, Edgar S. Hackney and J. E. Hess, the Three Individuals Residing in the City of Uniontown, County of Fayette, and Commonwealth of Pennsylvania, and All the Plaintiffs Being Citizens of Said Commonwealth and Domiciled in the Western District Thereof,

vs.

TOWER HILL CONNELLSVILLE COKE COMPANY OF WEST VIRGINIA, a Citizen of the State of West Virginia, Domiciled in the Southern District Thereof

DECREE—July 30, 1934

This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

(1) That the Memorandum Decision as this day amended, filed and made a part of the record in Equity Cause No. 3370, be and hereby is also filed and made a part of the record in this cause.

(2) That for the reasons stated in the said Memorandum Decision as amended, the motion of J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of said Order and of the Bill of Complaint Therein Mentioned" be and hereby it is sustained, and the said Order of Court entered February 19, 1934, be and hereby it is vacated, but this decree is without prejudice to A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, to assert the matters of fact and to seek the remedies set out in said Bill of Complaint in any court having jurisdiction.

(3) That said J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal

[fol. 26] and Coke Company shall recover their costs accrued upon said Motion.

Thereupon A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, by counsel, excepted to said decree of the Court, which exception is allowed, and at their instance a bill is sealed.

IN UNITED STATES DISTRICT COURT

No. 3370. In Equity

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and Hecla Coal and Coke Company, a Corporation

MEMORANDUM DECISION—Filed July 30, 1934

McCLINTIC, District Judge:

On the 19th day of February, 1934, the plaintiffs filed their ancillary bill of complaint in this cause against the defendants above named. It will be useless, so far as this memorandum is concerned, to give the history of the case, as that can easily be found in the decisions heretofore rendered by this court and by the Circuit Court of Appeals.

This bill is for the purpose of collecting large sums of money, from the defendants, alleged to be due to the receivers herein, and this bill is a consequence of the decisions of the courts in this case heretofore made.

The question before me is, has this court jurisdiction of this suit, and jurisdiction over these defendants, under the circumstances as they now stand herein?

The claim of the plaintiffs is that by reason of the appearance of these defendants in this suit before the Master [fol. 27] to whom this suit had been rendered, and by reason of the claims of these defendants filed before the Master, claiming certain sums of money in each case to be due each

one thereof, each one of them became a party to this suit for all purposes, and that by reason thereof, the receivers had a right to file this ancillary bill in this suit to recover the sums of money claimed.

For the purpose of information, this court entered an order on the 19th day of February, 1934, requiring the defendants to appear by a certain date and make any motions they might desire, and directing that a true copy of the order and of the bill be delivered to the defendants.

This order, and the things to be done thereunder, were then or now in no way intended to be a service of process upon these defendants. The whole theory of the plaintiffs was and is that these defendants were already parties to this suit, and did not require any service of process upon them, other than to give them notice of the filing of the bill.

By motions filed on the 19th day of March, 1934, the defendants first moved to quash what they called "service" upon the defendants, and to dismiss the bill for want of jurisdiction; also moved to vacate the order of court entered on the 19th day of February, 1934, and to quash the service of said order and of the bill of complaint mentioned therein.

As stated above, there was no pretense that such order was a service of process.

The sole question here is, has this court, under the circumstances herein set out, jurisdiction of the defendants? This question has been fully argued, and briefs have been filed by each side. Under the decisions of the Supreme Court of West Virginia, I am inclined to hold that they are parties for all purposes. However, I find but little, if any, supporting authority from federal courts for that holding.

I appreciate the fact that if I were to so hold, then the suit would have to proceed to a final conclusion before the question of jurisdiction could be finally decided. Great cost and expense would be incurred. It is to be regretted that a Federal District Judge has no way of certifying a question of this character to the Circuit Court of Appeals.

I think it right, in this case, however, to enter an order sustaining the motion of the defendants, so that the plain-
[fol. 28] tiffs can appeal therefrom and we can be favored with a final decision on the question whether this court has or has not jurisdiction, as claimed by the plaintiffs, and

which is denied by the defendants. This is, in one sense, an administrative act, but it will be the final order of this court on this question unless reversed by the court of superior jurisdiction.

Therefore, it will be the order of this court that the motions of the defendants, and each of them, be sustained.

IN UNITED STATES DISTRICT COURT

No. 1434. In Equity

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed July 30, 1934

And the said A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, assign the following errors in the record and proceedings in said cause:

(1) The District Court of the United States for the Southern District of West Virginia erred in entering its decree of July 30, 1934.

(2) Said Court erred in sustaining the motion of J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, filed March 19, 1934, entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of said Order and of the Bill of Complaint Therein Mentioned".

[fol. 29] (3) Said Court erred in not overruling said motion.

(4) Said Court erred in vacating its order entered February 19, 1934.

(5) Said Court erred in entering its decree of July 30, 1934, at No. 3370 in Equity (known as the "Ancillary Cause"), sustaining the motion filed therein March 19, 1934, and dismissing the Ancillary Bill of Complaint filed therein February 19, 1934.

For which errors, said A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers, pray that said decree of the United States District Court for the Southern District of West Virginia, entered July 30, 1934, in the above entitled cause, be reversed and the cause remanded, with directions to overrule said motion and to reinstate its said order entered February 19, 1934, and for such other and further relief as may be proper in the premises.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton, Counsel for Appellants.

IN UNITED STATES DISTRICT COURT

No. 1434. In Equity

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 30, 1934

[fol. 30] To Ira H. Mottesheard, Esq., Clerk:

Prepare and certify a transcript of the record for transmission to the Circuit Court of Appeals for the Fourth Circuit, in pursuance of the appeal heretofore taken, and include therein the following documents, some of which are filed at the above number (hereinafter referred to as the "Primary Cause"), and the others at No. 3370 in Equity (hereinafter referred to as the "Ancillary Cause"):

(1) Order entered in the Primary Cause December 12, 1933, appointing J. E. Campbell, Special Master.

(2) Statement in narrative form, pursuant to Equity Rule 75, of the evidence in the Primary Cause as approved by the Court or the Judge.

(3) Proof of claim of Hecla Coal and Coke Company filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of Hecla Coal and Coke Company as the Owner of Shares of the Preferred Stock and the Common Stock of the Tower Hill Connellsville Coke Company of West Virginia".

(4) Proof of claim of Thomas Watson filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of Thomas Watson".

(5) Proof of claim of Hillman Coal and Coke Company filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of Hillman Coal and Coke Company."

(6) Proof of claim of J. H. Hillman, Jr., and A. B. Sheets filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets, as Sureties upon the Supersedeas Bond of Tower Hill Connellsville Coke Company".

(7) Order entered February 19, 1934, in the Primary Cause.

(8) Ancillary Bill of Complaint filed February 19, 1934, in the Ancillary Cause.

(9) Affidavit of Ira H. Mottesheard filed February 19, 1934, in the Ancillary Cause.

(10) Order entered February 19, 1934, in the Ancillary Cause, filing said affidavit.

[fol. 31] (11) Motion filed March 19, 1934, in the Primary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of said Order and of the Bill of Complaint Therein Mentioned".

(12) Motion filed March 19, 1934, in the Ancillary cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction".

(13) Opinion of the Court marked "Memorandum Decision" filed in both Causes, sustaining said motions.

(14) Decree entered July 30, 1934, in the Primary Cause.

(15) Decree entered July 30, 1934, in the Ancillary Cause.

(16) Assignment of errors and prayer for reversal filed in the Primary Cause.

(17) Assignment of errors and prayer for reversal filed in the Ancillary Cause.

(18) This præcipe and such orders or directions as the Court or the Judge may enter or give relating to the transcript of the record pursuant to Equity Rule 75.

(19) Memorandum in accordance with Section 7 of Rule 14 of the Circuit Court of Appeals for the Fourth Circuit.

(20) Clerk's Certificate.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton, Attorneys for A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, Appellants.

Dated July 30, 1934.

[fol. 32] IN UNITED STATES DISTRICT COURT

NOTICE AS TO PRÆCIPE—Filed July 30, 1934

No. 1434. In Equity

[Title omitted]

To Edward W. Knight, Esq., and Alexander J. Barron, Esq., Attorneys for J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appellees:

You are hereby notified that on the 30th day of July, 1934, the Appellants, A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, filed with the Clerk of the District Court of the United States for the Southern District of West Virginia their præcipe indicating the portions of the record to be incorporated in the transcript of the record on their appeal in the above-entitled cause, a copy whereof being attached hereto.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton, Attorneys for Appellants.

July 30, 1934.

July 30, 1934, service of the above notice is hereby accepted and receipt of a copy thereof and of the præcipe therein mentioned is hereby acknowledged.

E. W. Knight, Attorney for Appellees.

[fol. 33] IN UNITED STATES DISTRICT COURT

No. 1434. In Equity

[Title omitted]

ORDER AS TO RECORD—Aug. 6, 1934

This cause came on to be further heard at this term, and thereupon came A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, appellants in the appeal heretofore allowed in this cause, by E. C. Higbee and Arthur S. Dayton, their attorneys; and thereupon came J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation, appellees in the foregoing appeal, by Edward W. Knight, and Alexander J. Barron, their attorneys, appearing especially for the sole purposes hereinbefore set forth in this cause, and thereupon the said appellees tendered their objections in writing to appellants' direction as contained in their præcipe for transcript of record, and appellees' objections to appellants' statement of essential parts of evidence and proceedings at a hearing held at Charleston, West Virginia, before J. E. Campbell, Special Master, on January 30, 1934, pursuant to decree of reference entered on December 12, 1933, and the same are hereby ordered filed. And thereupon appellees waived provisions of Equity Rule 75 as to proof or acknowl-
[fol. 34] edgment of service of a copy of the præcipe for the record in this cause, and waived provisions that the said præcipe should be lodged ten days in the Clerk's office, and waived all requirements as to notice and lodging in the Clerk's office of appellants' statement of essential parts of the evidence, and waived all requirements as to notice of this hearing, and it was agreed by the parties that all matters relating to the settlement and determination of the record upon the appeal heretofore awarded in this cause should be submitted to the Court at this time and place. And thereupon the Court having maturely considered appellees' objections to appellants' statement of essential parts of evidence and proceedings at a hearing held at Charleston, West Virginia, before J. E. Campbell, Special Master, on January 30, 1934, pursuant to decree of refer-

ence entered December 12, 1933, is of opinion to and doth hereby overrule the same, and the said statement of essential parts of evidence marked "Statement of Essential Parts of Evidence and Proceedings at a hearing held at Charleston, West Virginia, before J. E. Campbell, Special Master, on January 30, 1934, pursuant to Decree of Reference entered December 12, 1933", is hereby approved by the Court and ordered filed and is ordered to be made a part of the record for the purposes of said appeal. And the Court having maturely considered appellees' objections to appellants' directions as contained in their præcipe for transcript of record is opinion to, and doth overrule the same, and it is accordingly adjudged, ordered and decreed that the record upon the appeal allowed in this cause on the 30th day of July, 1934, shall be in accordance with appellees' præcipe for transcript of record filed in this cause on the 30th day of July 1934, and the Court doth decree, and doth hereby direct, that the record in this cause, being No. 1434 in equity, hereinafter referred to as the "primary cause", (the cause No. 3370 in equity being hereinafter referred to as "ancillary cause") shall consist of the following that is to say:

(1) Order entered in the Primary Cause December 12, 1933, appointing J. E. Campbell Special Master.

(2) Statement in narrative form, pursuant to Equity Rule 75, of the evidence in the Primary Cause as approved by this order.

[fol. 35] (3) Proof of claim of Hecla Coal and Coke Company filed January 30, 1934, in the Primary Cause marked "Proof of Claim of Hecla Coal and Coke Company as the Owner of Shares of the Preferred Stock and the Common Stock of the Tower Hill Connellsville Coke Company of West Virginia".

(4) Proof of claim of Thomas Watson filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of Thomas Watson".

(5) Proof of claim of Hillman Coal and Coke Company filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of Hillman Coal and Coke Company".

(6) Proof of claim of J. H. Hillman, Jr., and A. B. Sheets filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets, as Sureties upon the Supersedeas Bond of Tower Hill Connellsville Coke Company".

(7) Order entered February 19, 1934, in the Primary Cause.

(8) Ancillary Bill of Complaint filed February 19, 1934, in the Ancillary Cause.

(9) Affidavit of Ira H. Mottesheard filed February 19, 1934, in the Ancillary Cause.

(10) Order entered February 19, 1934, in the Ancillary Cause, filing said affidavit.

(11) Motion filed March 19, 1934, in the Primary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of said Order and of the Bill of Complaint Therein Mentioned".

(12) Motion filed March 19, 1934, in the Ancillary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hill-
[fol. 36] man Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction".

(13) Opinion of the Court marked "Memorandum Decision" filed in both Causes, sustaining said motions as amended by decree of July 30, 1934, in the Ancillary Cause.

(14) Decree entered July 30, 1934, in the Primary Cause.

(15) Decree entered July 30, 1934, in the Ancillary Cause.

(16) Assignment of errors and prayer for reversal filed in the Primary Cause.

(17) Assignment of errors and prayer for reversal filed in the Ancillary Cause.

(18) The said præcipe for the record hereinbefore referred to, this order and decree, and said objections of appellees.

(19) Memorandum in accordance with Section 7 of Rule 14 of the Circuit Court of Appeals for the Fourth Circuit.

(20) Clerk's Certificate.

All of which is ordered and decreed accordingly.

[fol. 37] IN UNITED STATES DISTRICT COURT

In Equity

No. 1434

[Title omitted]

APPELLEES' OBJECTIONS TO APPELLANTS' DIRECTIONS AS CONTAINED IN THEIR PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 6, 1934

To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

And now come J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appellees, by Edward W. Knight, Esq., and Alexander J. Barron, Esq., their solicitors, appearing specially for the sole purpose hereinbefore set forth in this cause and file the following objections to Appellants' Præcipe for the Transcript of the Record and the directions therein contained as to the general contents thereof, viz.:

One. Appellees object to the inclusion in said Transcript of the Record of the document designated in Paragraph Numbered (2) of Appellants' Præcipe as "Statement in narrative form, pursuant to Equity Rule 75, of the evidence [fol. 38] in the Primary Cause as approved by the Court or the Judge".

For the reason that the said Statement of Evidence is a narrative of certain testimony taken before J. E. Campbell, Special Master, in hearings which have not yet been concluded by him and is therefore incomplete and said testimony has not yet been returned by the said Special Master to this Court and no report thereon has been made or filed of record in this cause by said Special Master.

Two. Appellees object to the inclusion in said Transcript of the Record of the documents designated in Paragraphs Numbered (3), (4), (5) and (6) of Appellants' Præcipe, being certain Proofs of Claim presented on behalf of the Appellees to the said Special Master.

For the reason that no disposition has yet been made of said claims by said Special Master, no report thereon has been made by him or filed of record in this cause and the said Proofs are not a part of the record in this cause.

Three. Appellees object to the inclusion in said Transcript of the Record of the Bill of Complaint designated in Paragraph Numbered (8) of Appellants' Præcipe "Ancillary Bill of Complaint filed February 19, 1934, in the Ancillary Cause".

For the reason that the said Bill of Complaint is not filed in and is not a part of the record of this cause.

Four. Appellees object to the inclusion in said Transcript of the Record of the document designated in Paragraph Numbered (9) of Appellants' Præcipe as "Affidavit of Ira H. Mottesheard filed February 19, 1934, in the Ancillary Cause".

For the reason that the said affidavit was not filed in and is not a part of the record in this cause.

Five. Appellees object to the inclusion in said Transcript of the Record of the Order designated in Paragraph Numbered (10) of Appellants' Præcipe as "Order entered February 19, 1934, in the Ancillary Cause, filing said affidavit". [fol. 39] For the reason that the said Order is not filed in and is not a part of the record in this cause.

Six. Appellees object to the inclusion in said Transcript of the Record of the Motion designated in Paragraph Numbered (12) of Appellants' Præcipe as "Motion filed March 19, 1934, in the Ancillary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled 'Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction.' ".

For the reason that the said Motion is not filed in and is not a part of the record in this cause.

Seven. Appellees object to the inclusion in said Transcript of the Record of the Decree designated in Paragraph Numbered (15) of Appellants' Præcipe as "Decree entered July 30, 1934, in the Ancillary Cause".

For the reason that the said Decree is not filed in and is not a part of the record in this cause.

Eight. Appellees object to the inclusion in said Transcript of the Record of the Instrument designated in Paragraph Numbered (17) of Appellants' Præcipe as "Assignment of errors and prayer for reversal filed in the Ancillary Cause".

For the reason that the said Instrument is not filed in and is not a part of the record in this cause.

Appellees further submit that the Transcript of the Record in this cause shall consist of the following documents only:

(1) Order of Court entered December 12, 1933, in this cause.

(2) Order of Court entered February 19, 1934, in this cause.

[fol. 40] (3) Motion filed March 19, 1934, in this cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Vacate Order of Court entered February 19, 1934, and to Quash Service of said Order and of the Bill of Complaint therein mentioned".

(4) Opinion of the Court marked "Memorandum Decision" filed in this cause sustaining said Motion.

(5) Decree entered July 30, 1934, in this cause.

(6) Assignment of Errors and prayers for reversal filed in this cause.

(7) Appellants' Præcipe for Transcript of Record; Appellees' Objections thereto, as herein set forth, and such Orders and Directions as the Court or the Judge may enter or give relating to the Transcript of Record pursuant to Equity Rule 75.

(8) Memorandum in accordance with Section 7 of Rule 14 of the Circuit Court of Appeals for the Fourth Circuit.

(9) Clerk's certificate.

Edward W. Knight, Alexander J. Barron, Solicitors for Appellees, J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appearing Specially for the Sole Purpose Hereinbefore Set Forth, etc.

[fol. 41] IN UNITED STATES DISTRICT COURT

In Equity

No. 1434

[Title omitted]

APPELLEES' OBJECTIONS TO APPELLANTS' STATEMENT OF ESSENTIAL PARTS OF EVIDENCE AND PROCEEDINGS AT A HEARING HELD AT CHARLESTON, WEST VIRGINIA, BEFORE J. E. CAMPBELL, SPECIAL MASTER, ON JANUARY 30, 1934, PURSUANT TO DECREE OF REFERENCE ENTERED DECEMBER 12, 1933—Filed Aug. 6, 1934

To the Honorable George W. McClintic, Judge of said Court:

And now come J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, and Hecla Coal and Coke Company, Appellees, by Edward W. Knight, Esq., and Alexander J. Barron, Esq., their solicitors, appearing specially for the sole purpose hereinbefore in this cause set forth, and object to the Appellants' Statement of Essential Parts of Evidence and Proceedings at a hearing [fol. 42] held at Charleston, West Virginia, before J. E. Campbell, Special Master, on January 30, 1934, pursuant to Decree of Reference entered December 12, 1933, in the above cause, and respectfully request your Honorable Court not to approve the said Statement for the following reasons:

(1) The evidence from which the said Statement is taken is not filed in, or made a part of the record in this cause.

(2) The Proofs of Claim referred to in the Statement of Evidence were not on or before February 19, 1934, nor

have they at any time since been returned to this Court and filed by the said Special Master in this cause or made a part of the record in this cause.

(3) The Special Master has not yet completed the performance of his duties under the Decree of Reference entered December 12, 1933, and no report thereon has been filed in and made a part of the record in this cause.

Edward W. Knight, Alexander J. Barron, Solicitors for Appellees, J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appearing Specially for the Sole Purpose Hereinbefore Set Forth in This Cause and for No Other Purpose.

[fol. 43] IN UNITED STATES DISTRICT COURT

In Equity

No. 1434

[Title omitted]

STATEMENT OF ESSENTIAL PARTS OF EVIDENCE AND PROCEEDINGS AT A HEARING HELD AT CHARLESTON, WEST VIRGINIA, BEFORE J. E. CAMPBELL, SPECIAL MASTER, ON JANUARY 30, 1934, PURSUANT TO DECREE OF REFERENCE ENTERED DECEMBER 12, 1933—Filed Aug. 6, 1934

Evidence of Thomas Watson: The witness lives at Pittsburgh, Pennsylvania, is an attorney-at-law and secretary of Thompson Connellsville Coke Company and the Hecla Coal and Coke Company, and is a director of each of them. The Hecla Coal and Coke Company is a common and preferred stockholder of Tower Hill Connellsville Coke Company of West Virginia, owning 2,037 shares of the preferred stock of the latter company, evidenced by certificates of stock which the witness filed, and 2,451 shares of the common stock, evidenced by certificates of stock which the witness filed, all of said certificates being in the name of the Hecla Coal and Coke Company. The Hecla Coal and [fol. 44] Coke Company is the sole owner of these shares

which are not pledged. Proof of claim of Hecla Coal and Coke Company, marked "Proof of Claim of Hecla Coal and Coke Company as the Owner of Shares of the Preferred Stock and the Company Stock of the Tower Hill Connellsville Coke Company of West Virginia", was filed in connection with the witness' testimony.

Examination of Witness John T. Wilson by Thomas Watson: Mr. Wilson was asked by Mr. Watson if he had examined the books of the Tower Hill Connellsville Coke Company of West Virginia to see whether they showed any indebtedness due from that Company to J. H. Hillman, Jr., the witness answering in the affirmative and stating that the books showed that the Company owed J. H. Hillman, Jr., salary for the month of October, 1933, in the amount of $250.00. Mr. Watson asked the witness if he had examined the books of the Company to see what they showed in regard to any indebtedness due to Thomas Watson, the witness answering in the affirmative and stating that the books showed that there was due to Thomas Watson salary for the month of October, 1933, in the amount of $250.00. Mr. Watson tendered, and there was filed, the proof of claim of Thomas Watson, marked "Proof of Claim of Thomas Watson", for professional services rendered, showing a balance of $33,750.00. He also tendered, and there was filed, proof of claim of Hillman Coal and Coke Company, marked "Proof of Claim of Hillman Coal and Coke Company", for office expense and general overhead for the month of October, 1933, amounting to $2,-720.03. He also tendered, and there was filed, proof of claim of J. H. Hillman, Jr., and A. B. Sheets, as sureties upon the supersedeas bond filed on the appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the decree of the District Court of the United States for the Southern District of West Virginia, said proof of claim being marked "Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets as Sureties upon the Supersedeas Bond of Tower Hill Connellsville Coke Company".

[fol. 45] IN UNITED STATES DISTRICT COURT

No. 1434

In Equity

[Title omitted]

NOTICE OF LODGMENT

To Edward W. Knight, Esq., and Alexander J. Barron, Esq., Attorneys for J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appellees:

You are hereby notified that the Appellants, A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, have prepared and lodged in the office of the Clerk of the District Court of the United States for the Southern District of West Virginia, a statement of the essential parts of the evidence and proceedings in the above entitled cause, at a hearing held at Charleston, West Virginia, before J. E. Campbell, Special Master, on January 30, 1934, pursuant to a decree of reference entered December 12, 1933, for your examination and the examination of any other parties in interest. A copy of said statement is attached hereto.

You are further notified that we will ask the Court or the Judge to approve said statement on August 13th, 1934, at 2 o'clock, P. M., or as soon thereafter as the attention of the Court of the Judge can be had, at the farm of the [fol. 46] Honorable George W. McClintic near Marlinton, West Virginia.

Edwin W. Smith, Williamson M. Robinson, E. C. Higbee, Arthur S. Dayton, Attorneys for Appellants.

July 30, 1934.

July 30th, 1934, service of the foregoing notice is hereby accepted and receipt of a copy thereof and of the statement referred to therein is hereby acknowledged.

Edward W. Knight, Attorney for Appellees, appearing specially for the sole purpose hereinbefore set forth in this cause and for no other purpose.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA

In Equity

No. 3370

A. S. ALEXANDER, H. D. RUMMEL AND GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation.

ANCILLARY BILL OF COMPLAINT—Filed Feb. 19, 1934

To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

A. S. Alexander, H. D. Rummel and George S. Baton as Receivers of Tower Hill Connellsville Coke Company of [fol. 47] West Virginia, a corporation (hereinafter called "Receivers" and "Tower Hill" respectively) bring this, their Ancillary Bill of Complaint, against J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal Company, a corporation (hereinafter called respectively "Hillman", "Sheets", "Watson", "Hillman Company" and "Hecla" and together hereinafter sometimes referred to as "Defendants"), and for their cause of action the Receivers state:

1. In a case pending in your Honorable Court at No. 1434 in Equity, wherein Piedmont Coal Company, a corporation and others are plaintiffs and Tower Hill is defendant (hereinafter referred to as the "Primary Cause"), your Honorable Court, on August 25, 1932, entered its decree (hereinafter referred to as the "Primary Decree"), wherein and whereby it ordered, adjudged and decreed, inter alia, that the business and affairs of Tower Hill be terminated and wound up, that its properties and assets be sold and converted into money and that distribution thereof be made to its creditors and stockholders according to

their respective rights and priorities, and in order to effect said termination and winding up and the sale, conversion and distribution of said properties and assets, the Receivers were appointed as Receivers of all the properties and assets of Tower Hill of whatsoever character and wheresoever situate, and were particularly authorized, empowered and directed, among other things, to have, take and receive all said properties and assets of Tower Hill and to institute and prosecute all suits and proceedings necessary to recover possession of all and singular said properties and assets and every part thereof and otherwise to effectuate the provisions of said decree, and thereupon the Receivers qualified as such Receivers in accordance with the provisions of said decree and since then have been and are now engaged in the exercise of the authorities and the discharge of the duties of their appointment. By reference, the record of the Primary Cause, and particularly the Primary Decree, are made a part hereof with like effect as if herein set out in extenso, and this Bill of Complaint is filed as ancillary thereto and for the purpose of effectuating the provisions of the Primary Decree.

[fol. 48] 2. By decree of your Honorable Court entered in the Primary Cause on December 12, 1933, J. E. Campbell, Esq., was appointed Special Master in Chancery to take, state and report an account showing all the debts, obligations and claims against Tower Hill, the owners of its preferred and common stock and such other matters as said Master may deem pertinent.

3. At a hearing held by said Master in Charleston, West Virginia, on January 30, 1934, the Defendants each appeared and made proof of certain claims wherein and whereby they asserted and attempted to establish a right to participate in the distribution of the funds in or to come into the hands of the Receivers, each of which remains pending and undetermined, the nature whereof is as follows:

(a) Hillman claims $250.00 as salary as President of Tower Hill for the month of October, 1933:

(b) Watson claims $250.00 as his salary as Secretary of Tower Hill for the month of October, 1933, and the sum of $33,500.00 as a balance for professional services asserted to have been rendered by him to Tower Hill;

(c) Hillman and Sheets claim the sum of $105,000.00 as sureties upon the supersedeas bond filed on the appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the Primary Decree;

(d) Hillman Company claims the sum of $2,720.03 on account of what it asserts is Tower Hill's share of expense pools consisting of various operating, engineering, general office and sales offices expenses, which, by some sort of an arrangement, of which Receivers do not have knowledge, were apportioned by the Hillman Company as Pool Manager among a large number of corporations owned or controlled by Hillman and Sheets, of which Tower Hill was one; and

(e) Hecla claims to be the owner of 2,037 shares of the preferred stock and 2,451 shares of the common stock of Tower Hill.

[fol. 49] The Receivers deny the claims of Hillman, Watson, Hillman and Sheets, and Hillman Company and have objected thereto before the Special Master, and deny the right of Hecla to participate and share in the said distribution. The validity of said claims and the respective rights, obligations and liabilities of the Receivers and the Defendants can be ascertained only by an adjudication not only of said claims but also of claims, hereinafter stated in detail, asserted by the Receivers against the Defendants, and this Ancillary Bill is filed in order that each and all of said claims—those so asserted by the Defendants as well as those, hereinafter set forth, asserted by the Receivers—may be together considered and adjudicated by your Honorable Court and thereby the respective rights, obligations and liabilities of the Receivers and the Defendants may be finally and conclusively determined.

4. Continuously since May, 1920, Hillman, Sheets and Watson have been directors of Tower Hill and of Tower Hill Connellsville Coke Company, a corporation created under the laws of Pennsylvania (hereinafter called "Tower Hill of Pennsylvania"), all of whose stock is, and during all said period was, owned by Tower Hill. Continuously since June, 1920, they have also been directors of Eastern Coke Company, also a corporation created under the laws of Pennsylvania (hereinafter called "Eastern Coke"), a majority of whose stock originally and later all, was owned by

Tower Hill of Pennsylvania. In August, 1929, Eastern Coke conveyed and transferred all its property of every kind to Tower Hill of Pennsylvania and in January, 1930, Tower Hill of Pennsylvania conveyed and transferred all its property of every kind to Tower Hill, so that, upon the appointment of the Receivers, all rights and interests of said three corporations became vested in the Receivers. Continuously during said respective periods Hillman was President, Sheets Vice President or Treasurer, and Watson Secretary of each of said three corporations, and a majority of the directors of each were the same persons and were the nominees and, for all practical purposes, merely the employees of Hillman. Hillman, through the medium of intermediate stock ownership, indirectly controlled the majority stock of Tower Hill, absolutely dictated the poli- [fol. 50] cies, management and business of each of said corporations, and completely dominated their affairs. Sheets and Watson, as directors and officers of each of said three corporations, acquiesced in and approved of such domination and lent their assistance to carrying it into effect.

5. From January, 1930, to June, 1930, both inclusive, Hillman as President, Sheets as Vice President or Treasurer, and Watson as Secretary of Tower Hill, each with the knowledge and without the objection of the others, under the guise of salaries as such officers, severally drew out of its funds large sums of money, to-wit, Hillman $500.00 per month, Sheets $500.00 per month and Watson $250.00 per month; and from July, 1930, to September, 1933, both inclusive, they severally in like manner drew out of the funds of Tower Hill $250.00 per month. Said withdrawals were not authorized by any corporate action, and the Receivers are advised and therefore charge that all such withdrawals were and are illegal and unlawful disbursements and appropriations of the funds of Tower Hill. During the said period Tower Hill was doing substantially no business, the services rendered were little more than nominal, and the amounts of the withdrawals were extravagant, unreasonable and wholly disproportionate to the worth of any services rendered by said officers or any of them. The Receivers are advised and therefore charge that Hillman, Sheets and Watson are liable to the Receivers for the repayment of all sums of money so illegally received by them

respectively, and for such repayment demand is hereby made.

6. From May, 1920, to December, 1929, Hillman, Sheets and Watson, each with the knowledge and without the objection of the others, monthly drew out of the funds of Tower Hill of Pennsylvania large sums of money under guise of salaries as President, Vice President or Treasurer, and Secretary, respectively. Such withdrawals were not authorized by any corporate action, and the Receivers are advised and therefore charge that all such withdrawals were and are illegal and unlawful disbursements and appropriations of the funds of Tower Hill of Pennsylvania. The amounts so withdrawn were extravagant, unreasonable [fol. 51] and wholly disproportionate to the worth of any services rendered by said officers or any of them. The right to recover the amounts so unlawfully withdrawn from Tower Hill of Pennsylvania has become vested in the Receivers in the manner hereinbefore stated and for the repayment thereof the Receivers are advised and therefore charge that Hillman, Sheets and Watson are liable, and for such repayment demand is hereby made.

7. From July, 1920, to August, 1929, Hillman, Sheets and Watson, each with the knowledge and without objection of the others, monthly drew out of the funds of Eastern Coke large sums of money under the guise of salaries as President, Vice President or Treasurer, and Secretary, respectively. Such withdrawals were not authorized by any corporate action, and the Receivers are advised and therefore charge that all such withdrawals were and are illegal and unlawful disbursements and appropriations of the funds of Eastern Coke. The amounts so withdrawn were extravagant, unreasonable and wholly disproportionate to the worth of any services rendered by said officers or any of them. The right to recover the amounts so unlawfully withdrawn from Eastern Coke has become vested in the Receivers in the manner hereinbefore stated and for the repayment thereof the Receivers are advised and therefore charge that Hillman, Sheets and Watson are liable, and for such repayment demand is hereby made.

8. On or about July 30, 1930, Hillman caused Tower Hill to draw and deliver to Emerald Coal & Coke Company, a corporation of the State of Delaware (hereinafter

called "Emerald"), its voucher for $1,150,000.00, and on or about August 3, 1930, its second voucher for $34,000.00. At or about that time there was delivered to Tower Hill, and there is now in possession of the Receivers, a certificate purporting to represent 11,840 shares of the capital stock of Emerald of the par value of $100.00 each and aggregating at par $1,184,000.00. Each of said vouchers was in due course paid out of the funds of Tower Hill. Said transaction and the drawing and payment of both of said vouchers were unauthorized and were had and done without any corporate action whatsoever. Sheets and Watson knew of said transaction and of the issuance and delivery [fol. 52] of said vouchers at the time thereof, made no objection or protest and took no action to protect the interests of Tower Hill.

9. In order to raise funds to pay said vouchers, Hillman caused Tower Hill to sell high-grade income producing securities, for the most part at substantial losses, whereby the income of Tower Hill was greatly reduced. Sheets and Watson knew of said sales, made no objection or protest and took no action to protect the interests of Tower Hill.

10. At the time of said transaction, the stock of Emerald had never paid any dividends, gave no signs of ability so to do within any reasonable time in the future, and was wholly without any market value and of doubtful intrinsic worth. The sole asset of Emerald, aside from an insignificant amount of cash, was 100 shares of the capital stock of Emerald Coal Company, a Pennsylvania corporation, being all the outstanding shares of that Company. Substantially the only asset of Emerald Coal Company was something less than 10,000 acres of undeveloped coal in Greene County, Pennsylvania, which it had been carrying for twenty-five years and upwards. Emerald and its subsidiary, Emerald Coal Company (hereinafter collectively referred to as "Emerald"), had a mortgage indebtedness of $875,000.00 held by banking interests with which Hillman was connected, and outstanding notes in excess of $430,000.00 for moneys loaned by its stockholders. Emerald never had any gross income; the carrying charges of the property, aggregating more than $2,000,000.00, had been provided by its original stockholders in part by loans and in part by the purchase of additional shares; to maintain

the book value of its stock at par these enormous carrying charges were capitalized; it was in a precarious financial condition. Said tract of coal was not marketable and Emerald did not have and had no means of acquiring the funds necessary for its development. If it had been developed, it could not have been profitably operated.

11. At the time said transaction was entered into and the moneys of Tower Hill so expended, Hillman was obligated on a personal contract with Emerald to purchase 9,000 shares of Emerald stock for $900,000.00, and said transac- [fol. 53] tion was shifted to Tower Hill by Hillman in relief of his own liability and in discharge of his own obligation. Sheets and Watson knew of Hillman's personal obligation, made no objection or protest to the shift of it to Tower Hill and took no action whatever to protect Tower Hill's interests.

12. Said transaction was consummated at a time when Hillman, Sheets and Watson were fully advised of the intention of plaintiffs in the Primary Cause to file an Amended and Supplemental Bill charging fraudulent mismanagement of Tower Hill and praying for the winding up of its business and affairs. It was effectuated without any notice to your Honorable Court or to the plaintiffs in the Primary Cause, and it did not come to their knowledge until more than fourteen months after the transaction had been fully consummated.

13. The funds of Tower Hill were so expended in said Emerald transaction through the dominating influence and absolute control of Hillman in the affairs of Tower Hill, and all the facts were known to Sheets and Watson, who notwithstanding made no objection or protest and took no action to protect the interests of Tower Hill. The expenditure of said funds was, Receivers are advised, a misappropriation of the moneys and assets of Tower Hill, was made for the monetary gain and advantage of Hillman and to exonerate him from the obligations of a personal contract, and constitutes mismanagement of the corporate affairs of Tower Hill of a gross and fraudulent character.

14. Receivers are advised and therefore charge that Hillman, Sheets and Watson are legally liable to make good the funds of Tower Hill dissipated and misapplied in the

acquisition of the Emerald stock. Receivers being in possession of said shares, are ready and willing to return them to Hillman, Sheets and Watson, or any of them, upon their making good the funds so fraudulently dissipated with interest, and hereby demand therefor is made.

15. Hillman, Sheets and Watson are, and during all the times mentioned in the record in the Primary Cause and herein were, directors of Tower Hill, Hillman Company [fol. 54] and Hecla, and a number of other corporations the names of all of which are not known to Receivers but some of which they believe to be Hillman Transportation Company, Hillman Supply Company, Thompson-Connellsville Coke Company, Fayette Investment Company, Orenda Coal Company, General Water Company and Vulcan Real Estate Company, Hillman being President, Sheets Vice President or Treasurer and Watson Secretary of each of them. The majority directors and officers of Tower Hill, Hillman Company, Hecla and all said other corporations were the same persons and were the nominees and for practical purposes merely the employees of Hillman. He was the controlling head and dominating influence in all said corporations. Their principal offices were in the First National Bank Building, Pittsburgh, Pennsylvania, in the same suite in which were the private offices of Hillman, Sheets and Watson used by them in the conduct of their personal affairs, and also the principal offices of a number of other corporations controlled and dominated by Hillman. In the conduct of the affairs and the transaction of the business of said corporations and individuals, numerous persons were employed in common as assistants, stenographers, accountants, bookkeepers and clerks. The compensation of all such employees, the rent of said suits of offices and the other expenses incident to the conduct of said various businesses in said suite were paid by the Hillman Company under some sort of a pool arrangement and by it, as the pool manager and under the supervision of the individual Defendants, were apportioned among the various corporations referred to or some of them, including Tower Hill, in such respective amounts as Hillman and Sheets from time to time determined. So far as Receivers are advised, no part of said expenses has been charged against Hillman, Sheets or Watson or any other individuals occupying said offices and using said facilities.

During all said times the Hillman Company also maintained a sales department with offices not only in said suite in Pittsburgh, Pennsylvania, but in various other places, in and from which employees were engaged. The compensation of all such employees, the rent of all such sales offices and the other expenses incident to the operation of said sales department were in like manner apportioned among said corporations, or some of them, including Tower Hill, [fol. 55] by the Hillman Company as pool manager and in accordance with directions from time to time given by Hillman, Sheets and Watson.

The Hillman Company also maintained what it termed an operating department, consisting of various operating employees, and an engineering department, in which were employed a number of engineers. The compensation of all such employees and all the expenses incident to the performance of their work were likewise apportioned among said corporations, or some of them, including Tower Hill, by the Hillman Company as pool manager and in accordance with directions from time to time given by Hillman, Sheets and Watson.

16. Said Claim of the Hillman Company for $2,720.03, filed with said Special Master in the Primary Cause (being marked "Exhibit Hillman Coal & Coke Company Proof of Claim"), is Tower Hill's apportionment of said expense pools mentioned in the preceding paragraph hereof for the month of October, 1933, as made by the Hillman Company under the direction of Hillman, Sheets and Watson.

17. On account of said apportionments of said expense pools referred to in paragraph 15 hereof, Tower Hill from time to time made large payments, the aggregate whereof, considering the nature, character and extent of its business, far exceeded the fair, reasonable and conscionable expenditures for such purposes and constituted improvident, exorbitant, unnecessary and fraudulent waste and misappropriation of the moneys and funds of Tower Hill. All this was done, as Receivers believe and charge, for the benefit of the individual Defendants in the conduct of their personal affairs and also for the advantage of some of the other corporations in which they had larger interests and greater concern, and was a manipulation of the business and affairs of Tower Hill to its detriment and loss and that of its stockholders, and for the monetary gain and aggran-

dizement of the individual Defendants and their associated and allied interests.

18. The extent of the operations and business of Tower Hill never justified the expenses for which it was charged by said apportionments. A small office and a limited [fol. 56] amount of sales, clerical and operating service were all that it required for every legitimate need of its business, and the expenses incident thereto ought to have cost only a small portion of the sums actually expended by this apportionment method. If the welfare of Tower Hill and its stockholders had been alone consulted, much less expense would have been incurred, but as it was, the business of Tower Hill was conducted as a department of the larger Hillman enterprises, for the purpose and with the result of casting upon Tower Hill an unjust proportion of the total cost and imposing upon it an excessive cost of carrying on its business.

19. No corporate action adopting, ratifying or approving said method of conducting the business of Tower Hill, as hereinbefore set forth, was ever taken, and the practice was established and pursued and the payments made at the instance and by the dominating influence of Hillman, who through the medium of intermediate stock ownership indirectly controlled the majority of stock of Tower Hill, absolutely dictated its policy, management and business and was in effect the corporation itself; and Sheets, as Director and Vice President or Treasurer, and Watson as Director and Secretary of Tower Hill, participated in said practice and payments and took no action to protect Tower Hill against said unlawful and fraudulent impositions.

20. Hillman, Sheets and Watson, as directors and officers of Tower Hill, failed and neglected to discharge their duties in respect of said payments, to protect the interests of Tower Hill, to regard and perform their duties as trustees for its minority stockholders, and to act with the good faith their duties, obligations and trusts required and demanded. In consequence whereof, Tower Hill lost large sums of money, the full amount of which can be determined only by a full and complete accounting, but which greatly exceeds the amount of the Hillman Company's said claim in the Primary Cause.

21. For the payment of such moneys as upon said accounting it may be decreed were improvidently, unlawfully and fraudulently paid out of the funds of Tower Hill, the individual Defendants and the Hillman Company are liable, and demand for such accounting and repayment is hereby made.

[fol. 57] 22. Said practice of apportioning said expense pools began as regards Tower Hill about January 1, 1930, and continued to and including October, 1933, but prior thereto and from April, 1920, to and including December, 1929, there existed a like practice as regards Tower Hill of Pennsylvania. Said practice, as regards Tower Hill of Pennsylvania, was of the exact character and with the same injurious result and want of justification as herein averred in the case of Tower Hill, was without any corporate authorization or ratification, was with and for the same false and fraudulent intent and purpose as in the case of Tower Hill, and was in like manner actuated and dictated by Hillman and participated in by Sheets and Watson. The right to demand an accounting of and to recover said unlawful payments, as herein already stated, is now vested in the Receivers. The amount of such unlawful payments can be determined only by a full and complete accounting.

23. For the repayment of such moneys as upon said accounting it may be decreed were improvidently, unlawfully and fraud-ently paid out of the funds of Tower Hill of Pennsylvania, the individual Defendants and Hillman Company are liable to the Receivers, and demand for such accounting and repayment is hereby made.

24. From June, 1920, to August, 1929, a like practice of apportioning said expense pools prevailed as regards Eastern Coke. Said practice, as regards Eastern Coke, was of the exact character and with the same injurious result and want of justification as herein averred in the case of Tower Hill, was without any corporate authorization or ratification, was with and for the same false and faudulent intent and purpose and was in like manner actuated and dictated by Hillman and participated in by Sheets and Watson. The right to demand an accounting of and to recover said unlawful payments, as herein already stated, is now vested in

the Receivers. The amount of all such unlawful payments can be determined only by a full and complete accounting.

25. For the repayment of such moneys as upon said accounting it may be decreed were improvidently, unlawfully and fraudulently paid out of the funds of Eastern Coke, the [fol. 58] individual Defendants and Hillman Company are liable to the Receivers, and demand for such accounting and repayment is hereby made.

26. During the period from April, 1920, to October, 1933, the business of Tower Hill and of its subsidiaries, Tower Hill of Pennsylvania and Eastern Coke, all of whose properties and rights are now vested in the Receivers, was the mining of coal and the manufacture of coke from properties in Fayette County, Pennsylvania. All the coal produced and coke manufactured from said properties during said period, at the instance of Hillman and with the acquiescence and approval of Sheets and Watson, were taken and disposed of by the Hillman Company. Upon the appointment of the Receivers, they received from Hillman, Sheets and Watson certain books and records which were said by them to be all the books and records of Tower Hill and its subsidiaries. Said books do not disclose, and the Receivers are not advised of, the amounts of coal produced and coke manufactured from said properties during the several months and years of said period, or to whom, in what manner, for what price, and upon what terms and conditions they may have been sold or otherwise disposed of. From these records it would appear that certain amounts were monthly paid by the Hillman Company to Tower Hill and its subsidiaries, but said records wholly fail to show, and the Receivers are without information, whether said coal and coke were sold by Tower Hill and its subsidiaries to the Hillman Company and, if so, the amount of the tonnage and the amount and adequacy of the price, or whether such coal and coke were sold by the Hillman Company for the account of Tower Hill and its subsidiaries and, if so, what commission or compensation was received or deducted by the Hillman Company, or to whom and upon what contracts such coal and coke were delivered.

The Receivers are informed, but are without complete knowledge, that said coal and coke were apportioned upon and among contracts taken by the Hillman Company, but they are wholly without knowledge of the facts necessary to

determine the propriety and fairness of such allocation and apportionment. The Receivers are advised and believe, and therefore charge, that it cannot be determined whether [fol. 59] the Hillman Company has fully and properly accounted for all such coal produced and coke manufactured from said properties during said period unless a full and complete accounting be judicially had and taken of all such coal and coke and the disposition thereof, and the Receivers are advised that as, during the whole of said period, a majority of the Board of Directors of the Hillman Company and of Tower Hill and its subsidiaries was composed of the same persons, and as all said companies were under the direction and domination of Hillman, they are entitled as a matter of right to such accounting.

27. The Receivers are advised and believe, and therefore aver, that Hillman, Sheets and Watson, as officers and directors of Tower Hill and its subsidiaries, failed and neglected to conduct the business of said corporations and to manage their affairs as independent going concerns, and in violation of their duties as directors and trustees for said corporations and their minority stockholders, caused and permitted Tower Hill and its subsidiaries to be operated as mere departments of the Hillman Company, in consequence of which wrongdoing, negligence and failure, Tower Hill and its subsidiaries lost large sums of money, for the payment of which, upon a proper accounting, the individual Defendants and the Hillman Company are liable. For such accounting and payment demand is hereby made.

28. In August, 1929, Hecla sold and conveyed to Redstone Coal and Coke Company (hereinafter called "Redstone"), a certain tract of coal land situate in Fayette County, Pennsylvania, consisting of about 2,000 acres and known as its Isabella Plant, at $2,000 per acre for the said tract of coal and an additional price, fixed by appraisement, for the developments, improvements and equipment on said tract.

29. As a condition of said purchase, Redstone insisted upon a certain minimum acreage, which was in excess of that owned by Hecla, and as a further condition, required that it be relieved of its coal mine and coke plant known as Thompson-Connellsville No. 1, in which there were 178.4 acres of unmined coal consisting of ribs, stumps and pillars,

incapable of being profitably mined and of little, if any, value.

[fol. 60] 30. In order to meet the said conditions and effect said sale by Hecla, and for its benefit, 48 acres of the coal of Tower Hill of Pennsylvania were conveyed to Redstone at a price of $2,000 per acre, and an additional 178.4 acres of its coal were conveyed to Redstone in exchange for which the said Thompson-Connellsville No. 1 plant was conveyed by Redstone to Tower Hill of Pennsylvania. The 178.4 acres of Tower Hill of Pennsylvania's coal so conveyed was of a value of at least $2,000 per acre.

31. Said sale and exchange stripped Tower Hill of Pennsylvania of its most desirable coal, and the result was that its remaining coal acreage was incapable of profitable operation and there was foisted upon it a practically worthless property.

32. The said exchange was caused to be made by Hillman through his domination and control of the business and affairs of Tower Hill of Pennsylvania, and the purpose of it was to benefit him and Hecla at the loss and expense of Tower Hill of Pennsylvania. The majority of the directors of Hecla and Tower Hill of Pennsylvania were the same persons, and Hecla, through its control of Fayette Investment Company and thereby of Thompson-Connellsville Coke Company, was the owner of the majority of the capital stock of Tower Hill, which in turn owned all the stock of Tower Hill of Pennsylvania. The transaction was to the great advantage and profit of Hillman and Hecla and Hillman's allied interests and to the great disadvantage and loss of Tower Hill of Pennsylvania and Tower Hill. If Tower Hill of Pennsylvania had been independently represented, it would not have exchanged said 178.4 acres of its coal for said plant, Thompson-Connellsville No. 1, but would have demanded and required that payment for said 178.4 acres be made in cash. Thus Hecla, in order to effectuate its said sale, would itself have had to take over said Thompson-Connellsville No. 1 plant instead of foisting that property upon Tower Hill of Pennsylvania. As it was, Hillman, through his domination and control of Tower Hill of Pennsylvania, willfully, wantonly and fraudulently sacrificed its properties and rights to enrich Hecla, in which he had larger interest and greater concern. The benefits,

[fol. 61] advantages and profits of the trancaction were accepted and enjoyed by Hecla.

33. Sheets and Watson had full knowledge of all the facts alleged in paragraphs 28 to 32 hereof, both inclusive, and made no objection to or protest against the said exchange but as officers and directors of Tower Hill of Pennsylvania, Tower Hill and Hecla, participated in the measures by which the said exchange was effected.

34. Tower Hill of Pennsylvania sustained further and additional serious losses in that since said transaction, Thompson-Connellsville No. 1 has been incapable of separate operation, the limited amount of coal mined therefrom has been through the Thompson-Connellsville No. 2 mine owned by Thompson-Connellsville Coke Company, and the large sums of money which have been expended in taxes, maintenance and improvements have greatly exceeded the gross receipts. Said expenditures were, under the circumstances, grossly improvident, have resulted in no value to Tower Hill of Pennsylvania or Tower Hill and were brought about by the fraud of Hecla and the individual Defendants in imposing Thompson-Connellsville No. 1 upon Tower Hill of Pennsylvania.

35. Receivers are advised and therefore charge that as against Tower Hill of Pennsylvania, with whose rights the Receivers are now vested, as herein already stated, said exchange was and is fraudulent and should be undone and Tower Hill of Pennsylvania, or Tower Hill, placed in the same situation that it would have been in if it had received the value of its said 178.4 acres of coal in cash instead of by a conveyance to it of said Thompson-Connellsville No. 1 plant; that the fair and rightful consideration for the 178.4 acres of coal so conveyed to Redstone in said exchange was not less than $2,000 per acre in cash; that in forcing Tower Hill of Pennsylvania to accept in lieu thereof the Thompson-Connellsville No. 1 plant, Hecla and the individual Defendants committed a fraud upon Tower Hill of Pennsylvania and on account thereof the Receivers are entitled to receive from Hecla and the individual Defendants the sum [fol. 62] of $356,800 with interest thereon from August 31, 1929; that the Receivers are also entitled to have a full and complete accounting of all moneys received on account of coal mined from the Thompson-Connellsville No. 1 property

and from the disposition of any other part of said property and of all moneys expended on account of said property by way of taxes, maintenance, improvements or otherwise, since August 31, 1929, and that the Receivers are entitled to receive all such moneys as upon such accounting it may be decreed should be paid to the Receivers by Hecla and the individual Defendants; and that upon the payment of all such sums of money, it will be the duty of Tower Hill and the Receivers to convey the Thompson-Connellsville No. 1 property to Hecla or to whomsoever may be lawfully entitled thereto. Tower Hill and the Receivers are ready and willing to make such conveyance upon such payment. For such accounting and payments demand is hereby made.

Wherefore, the Receivers, showing that said claims so asserted by Defendants before said Special Master in the Primary Cause cannot be adjudicated independently of a consideration of the claims herein asserted by the Receivers against the Defendants and the adjudication of all said claims of the Defendants and said claims of the Receivers against the Defendants in one proceeding is necessary for the effectual enforcement of the decree in the Primary Cause, pray:

1. That there may be adjudicated in this ancillary proceeding the respective rights, obligations and liabilities of the Receivers and the Defendants, and each of them, respecting any and all matters to which reference is made in this Ancillary Bill, including the claims of the respective Defendants referred to in paragraph 3 hereof, and that payments of moneys may be decreed to be made in accordance with such adjudication.

2. That the Defendants Hillman, Sheets and Watson, and each of them, may be required fully and accurately to account for all moneys received by them during the period May, 1920, to October, 1933, under the guise of salaries as officers of Tower Hill and/or Tower Hill of Pennsylvania and/or Eastern Coke, and that said Defendants, and each of [fol. 63] them, be decreed to repay to the Receivers all the said moneys; and that said Defendants, and each of them, be decreed to pay to the Receivers the further sum of $1,184,000.00, with interest thereon from August 3, 1930, upon the surrender by the Receivers of the above men-

tioned 11,840 shares of the capital stock of Emerald Coal & Coke Company.

3. That the Defendants Hillman, Sheets and Watson and the Defendant Hillman Company, and each of them, may be required fully and accurately to account for all moneys received or retained by Hillman Company from Tower Hill and/or Tower Hill of Pennsylvania and/or Eastern Coke on account of the pool arrangements by which Hillman Company attempted to apportion and allocate certain office, operating, sales, overhead, and engineering expenses between and among various corporations with which it was directly or indirectly connected or affiliated, including Tower Hill and its subsidiaries Tower Hill of Pennsylvania and Eastern Coke, and also of all coal produced and coke manufactured from the properties of Tower Hill and its subsidiaries, Tower Hill of Pennsylvania and Eastern Coke, during the period April, 1920, to October, 1933, and the proceeds of sale or other disposition thereof; and that said Defendants, Hillman, Sheets, Watson and Hillman Company, and each of them, be decreed to pay to the Receivers all such moneys as upon such accounting may be adjudicated to be due and owing to Tower Hill or the Receivers.

4. That the Defendants Hillman, Sheets and Watson and the Defendant Hecla, and each of them, be decreed to pay to the Receivers the sum of $356,800.00, with interest thereon from August 31, 1929, being the value in cash of the 178.4 acres of coal conveyed by Tower Hill of Pennsylvania to Redstone Coal & Coke Company in exchange for said Thompson-Connellsville No. 1 property, upon the conveyance by the Receivers of said Thompson-Connellsville No. 1 property to such person or persons as the Court may direct; and that said Defendants, and each of them, may be required fully and accurately to account for and repay to the Receivers all moneys of Tower Hill and/or Tower Hill of Pennsylvania expended for taxes upon and operation and maintenance of said Thompson-Connellsville No. 1 [fols. 64 & 65] property and/or the electrification thereof, improvements thereon, and machinery and equipment therefor, less, however, such moneys as have been heretofore received by Tower Hill and/or Tower Hill of Pennsylvania for coal produced and coke manufactured and sold from said Thompson-Connellsville No. 1 property.

5. For such other, further and additional relief as, upon such accountings and further proceedings in this Ancillary Cause or in said Primary Cause, it may be made to appear that justice and equity require.

George S. Baton, A. S. Alexander, H. D. Rummel, Receivers of Tower Hill Connellsville Coke Company of West Virginia; Edwin W. Smith, Arthur S. Dayton, E. C. Higbee, Wm. M. Robinson, Solicitors for Complainants.

Duly sworn to by A. S. Alexander et al. Jurats omitted in printing.

[fol. 66] IN UNITED STATES DISTRICT COURT

In Equity

No. 3370

[Title omitted]

ORDER FILING AFFIDAVIT ETC.—Feb. 19, 1934

This day came A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, by counsel and tendered and asked leave to file the affidavit of Ira H. Mottesheard, Clerk of this Court, that at the request and on behalf of the said Receivers the said Mottesheard had personally, on the 19th day of February, 1934, deposited in the United States mail, at Charleston, West Virginia, a true and correct copy of the bill of complaint in this ancillary cause; and copy of order entered on the 19th day of February, 1934, in the chancery cause pending in this Court, No. 1434 in Equity, or Piedmont Coal Company, et als, vs. Tower Hill Connellsville Coke Company of West Virginia, both certified by the Clerk of this Court, inserted in envelopes addressed to the following respective parties: J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, each at First National Bank Building, Pittsburgh, Pennsylvania, and each such envelope properly stamped and registered, and that the said affiant had personally on the 19th day of

February, 1934, delivered a copy of said order and said bill, likewise certified by the Clerk of this Court, at the office of E. W. Knight, Esq., in Charleston, West Virginia, which affidavit being seen and inspected by the Court is now here ordered filed.

[fol. 67] IN UNITED STATES DISTRICT COURT

In Equity

No. 3370

[Title omitted]

AFFIDAVIT OF IRA H. MOTTESHEARD, CLERK—Filed February 19, 1934

STATE OF WEST VIRGINIA,
County of Kanawha, ss:

This day personally appeared before me, a Notary Public in and for the county and state aforesaid, Ira H. Mottesheard, who being by me first duly sworn, deposes and says that he is Clerk of the District Court of the United States for the Southern District of West Virginia, in which said Court an ancillary bill of complaint in the above entitled cause was filed by order entered by said Court on the 19th day of February, 1934, in the chancery cause of Piedmont Coal Company, et als., plaintiffs, vs. Tower Hill Connellsville Coke Company of West Virginia, Defendant, No. 1434 in Equity. Affiant further says that at the request and upon behalf of A. S. Alexander, H. D. Rummel and George S. Baton, Receivers, plaintiffs in the above entitled cause, and in accordance with said order, this affiant personally, on the 19th day of February, 1934, deposited in the United States mail, at Charleston, West Virginia, a true and correct copy of said order and of said ancillary bill of complaint of A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, vs. J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Com-
[fol. 68] pany, certified by this affiant as Clerk of said

Court as aforesaid, inserted in envelopes addressed to the following respective parties: J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, and Hecla Coal and Coke Company, each at First National Bank Building, Pittsburgh, Pennsylvania, and affiant further says that each such envelope was properly stamped and registered. Affiant further says that on the 19th day of February, 1934, this affiant personally delivered a copy of said order and said ancillary bill, each likewise certified by this affiant as Clerk of said Court as aforesaid, at the office of E. W. Knight, Esq., in Charleston, West Virginia.

Ira H. Mottesheard.

Taken, subscribed and sworn to before me this 19th day of February, 1934.

(Notarial Seal.)

Carrie Davis, Notary Public in and for the County and State aforesaid.

My commission expires July 6th, 1942.

IN UNITED STATES DISTRICT COURT

In Equity

No. 3370

[Title omitted]

MOTION TO QUASH SERVICE AND TO DISMISS BILL FOR WANT OF JURISDICTION

[fol. 69] To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation, defendants herein, each by his or its attorney, appears herein specially for the sole purpose of making this motion to question the jurisdiction of the Court in this proceeding and for said purpose only moves the Court to quash the service

of a copy of the order entered by this court in the case of Piedmont Coal Company and others against Tower Hill Connellsville Coke Company of West Virginia, No. 1434 in Equity, and a copy of the Bill of Complaint filed at the above Number in Equity and therein designated as "Ancillary Bill of Complaint" and to dismiss said Bill for want of jurisdiction on the following grounds:

(1) No legal service of process has been made on any of the defendants in this proceeding and this Court has no jurisdiction in rem or in personam of any of the defendants to said Bill.

(2) It does not appear of record that any of the defendants are citizens or inhabitants of, or residents in, or were to be found within, the Southern District of West Virginia at the time of the filing of the said Bill of Complaint.

(3) Each of the individual defendants at the time of the filing of the said Bill of Complaint and of the mailing of a copy of the said Bill to him and for many years prior thereto was a citizen and inhabitant of the Commonwealth of Pennsylvania and a resident of the City of Pittsburgh, Allegheny County, in said Commonwealth, and was not to be found either within the Southern District of West Virginia or within the State of West Virginia; and at no time since the filing of the said Bill have any of the said defendants been a citizen, inhabitant or resident of, or to be found within, the said Southern District of West Virginia, or State of West Virginia.

[fol. 70] (4) Hillman Coal and Coke Co[illegible] and Hecla Coal and Coke Company is each a corporation incorporated under the laws of the Commonwealth of Pennsylvania, having its domicile in the City of Pittsburgh, County of Allegheny in said Commonwealth, and neither of said corporations owns or possesses any property within the Southern District of West Virginia, or is registered to do business within said State of West Virginia or has an agent therein for the service of process upon it, or does any business therein.

E. W. Knight, Brown, Jackson & Knight, Alter, Wright and Barron, Attorneys for the aforesaid defendants appearing specially for the sole purpose aforesaid.

In United States District Court

In Equity

No. 3370

A. S. Alexander, H. D. Rummerl and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation,

vs.

J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation.

Decree—July 30, 1934

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

(1) That the memorandum decision of this Court, marked "Memorandum Decision" and prepared by the Court after submission of this cause, be and the same is hereby amended by including therein the following finding [fol. 71] pursuant to the stipulation of Counsel for Plaintiffs and Defendants made on the argument of the said cause, to-wit, that on or before February 19, 1934, neither the said J. H. Hillman, Jr., A. B. Sheets nor Thomas Watson was an inhabitant of the Southern District of West Virginia, but each of said individual defendants on or before said date was, ever since has been and now is a citizen of the Commonwealth of Pennsylvania, a resident of the City of Pittsburgh in said Commonwealth and an inhabitant of the Western District of Pennsylvania; and that on or before said date neither Hillman Coal and Coke Company nor Hecla Coal and Coke Company was an inhabitant of the Southern District of West Virginia, but each of said corporate defendants on or before said date was, ever since has been and now is a corporation created, organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office or place of business in said City of Pittsburgh and a citizen and resident of said Commonwealth and an inhabitant of the Western

District of Pennsylvania and that neither of said corporations on or after said date had or has had a place of business in or transacted any business within the State of West Virginia.

(2) That the said Memorandum Decision as amended be and hereby is filed and made part of the record in this cause.

(3) That for the reasons stated in said Memorandum Decision as amended Defendants' motion entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction," filed March 19, 1934, be, and hereby it is sustained and the Bill of Complaint entitled "Ancillary Bill of Complaint" filed February 19, 1934, in this cause and referred to in said Motion be and hereby it is dismissed for want of jurisdiction over the persons of the Defendants, but this decree is without prejudice to A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, to assert the matters of fact and to seek the remedies set out in said Bill of Complaint in any court having jurisdiction.

(4) That Defendants shall recover their costs accrued upon said Bill of Complaint and said Motion.

[fol. 72] Thereupon Plaintiffs, by counsel, excepted to the judgment and decree of the Court, which exception is allowed and at their instance a bill is sealed.

IN UNITED STATES DISTRICT COURT

In Equity

No. 3370

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed July 30, 1934

And the said A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke

Company of West Virginia, a corporation, assign the following errors in the record and proceedings in said cause:

(1) The District Court of the United States for the Southern District of West Virginia erred in entering its decree of July 30, 1934.

(2) Said Court erred in sustaining the motion of Defendants filed March 19, 1934, and marked "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction."

(3) Said Court erred in not overruling said motion.

(4) Said Court erred in dismissing the Ancillary Bill of Complaint for want of jurisdiction.

(5) Said Court erred in entering its decree of July 30, 1934, at No. 1434 in Equity (known as the "Primary Cause"), sustaining the motion filed therein March 19, 1934, and vacating the order entered therein February 19, 1934.

[fol. 73] (6) Said Court erred in refusing to adjudge and decree that it had jurisdiction of this ancillary cause and of the persons of Defendants, and in failing and refusing further to consider this cause and upon such consideration to grant relief as prayed for in said Ancillary Bill of Complaint.

For which errors, said A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers, pray that said decree of the United States District Court for the Southern District of West Virginia, entered July 30, 1934, in the above entitled cause, be reversed and the cause remanded with directions to overrule said motion and to re-instate said Ancillary Bill of Complaint, and for such other and further relief as may be proper in the premises.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton.

IN UNITED STATES DISTRICT COURT

STIPULATION TO PREPARE TRANSCRIPT OF RECORD AND PRINT SAME UNDER RULE 23 OF THE UNITED STATES CIRCUIT COURT OF APPEALS—Filed August 6, 1934

PIEDMONT COAL COMPANY, a Corporation, and G. S. HARAH, EDGAR S. HACKNEY and J. E. HESS

versus

TOWER HILL CONNELLSVILLE COKE COMPANY OF WEST VIRGINIA, a Corporation

It is hereby stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above styled cause, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va., and that it be printed under the supervision of the Clerk of that Court, in accordance with Rule 23.

Arthur S. Dayton, Counsel for Appellants. Edward W. Knight, Counsel for Appellees.

August 3, 1934.

[fol. 74] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL

(Filed July 30, 1934

ORDER ALLOWING APPEAL

(Entered of Record July 30, 1934)

BOND ON APPEAL

(Executed by A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, as principals, and United States Fidelity and Guaranty Company, a corporation, as surety, in the sum of Two Hundred Dollars, and conditioned to prosecute appeal to effect and answer all costs. Dated July 30, 1934, and approved and filed as of the same date.)

CITATION.

(Issued July 30, 1934, and returnable at Richmond within forty days from the date thereof. Service accepted thereon as of the 30th day of July, 1934.)

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 75] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3736

A. S. ALEXANDER, H. D. RUMMEL AND GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Appellants,

versus

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and Hecla Coal and Coke Company, a Corporation, Appellees

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston. In Equity

DOCKET ENTRIES

August 14, 1934, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond and citation are certified up under section 7 of Rule 14.

Same day, the appearance of Arthur S. Dayton is entered for the appellants.

August 21, 1934, the special appearance, for the sole purpose of raising the question of jurisdiction, of Geo. E. Alter, [fol. 76] Alexander J. Barron and Edward W. Knight is entered for the appellees.

August 24, 1934, twenty-five copies of the printed record are filed.

September 29, 1934, the appearance of Edwin W. Smith, E. C. Higbee, William M. Robinson and Arthur S. Dayton is entered for the appellants.

Argument of Cause

October 12, 1934 (October term, 1934,) cause came on to be heard, together with No. 3737, before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

In United States Circuit Court of Appeals, Fourth Circuit

No. 3736

A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Appellants,

versus

J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a Corporation, and Hecla Coal and Coke Company, a Corporation, Appellees

[fol. 77] No. 3737

A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporaton, Appellants,

versus

J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a Corporation, and Hecla Coal and Coke Company, a Corporation, Appellees

Appeals from the District Court of the United States for the Southern District of West Virginia, at Charleston

Argued October 12, 1934. Decided January 22, 1935

Before Parker, Northcott and Soper, Circuit Judges

E. C. Higbee and Arthur S. Dayton (Edwin W. Smith and Wm. M. Robinson on brief) for Appellants, and E.

W. Knight (George E. Alter and Alexander J. Barron on brief) for Appellees.

OPINION—Filed Jan. 22, 1935

NORTHCOTT, Circuit Judge:

These are appeals from two decrees entered in the District Court of the United States for the Southern District of West Virginia, one of which was entered in a suit in equity, wherein Piedmont Coal Company and others are plaintiffs and Tower Hill Connellsville Coke Company of [fol. 78] West Virginia is defendant, and permitted the filing of an ancillary bill. The other was entered in the ancillary proceedings so commenced, in which the receivers of Tower Hill Company, the appellants, are plaintiffs and the appellees are defendants. The original suit has been twice before this Court (33 Fed. (2d) 703; 64 Fed. (2d) 817), in each of which certiorari was denied (280 U. S. 607, 64 L. Ed. 650; 290 U. S. 675, 78 L. Ed. 86).

Upon the last appeal in the original cause this court affirmed the decree of the District Court, entered August 25, 1932, which directed that the business and affairs of Tower Hill be terminated and wound up, its property and assets sold and converted into money and distribution thereof made to its creditors and stockholders according to their respective rights and priorities. For that purpose the District Court had appointed A. S. Alexander, H. D. Rummel, and George S. Baton receivers of all the property and assets of Tower Hill of whatsoever character and wheresoever situate, with power to procure the appointment of ancillary receivers whenever and wherever in their judgment such ancillary receivers should be necessary to effectuate any of the provisions of the decree and to institute and prosecute, either in their own names or through such ancillary receivers, all suits and proceedings necessary to recover possession of all the property and assets of the corporation.

On December 12, 1933, the District Court entered an order in the cause referring same to J. E. Campbell as special master, to take, state, and report to the court an account, showing all the debts, obligations and claims against Tower Hill, with the nature, amount, and respective priorities thereof, the owners of the preferred and common

stock of Tower Hill and such other matters as any party in interest might require. And on January 30, 1934, at a hearing duly held by the Special Master in Charleston, West Virginia, pursuant to the order of reference, J. H. Hillman, Jr., A. B. Sheets and Thomas Watson, all of whom are citizens of the Commonwealth of Pennsylvania residing in the Western District thereof, and Hillman Coal and Coke Company and Hecla Coal and Coke Company, each of which is a corporation of the Commonwealth of Pennsylvania having its principal place of business in the Western District thereof, filed certain proofs of claim as creditors and stock-[fol. 79] holders of Tower Hill and testimony was taken with regard thereto. The claim of Hecla is that it is a holder of preferred and common stock of Tower Hill, and the claims of the other claimants are for alleged debts said to be owing by Tower Hill. Each of the claims remains pending and undetermined before the Special Master.

On February 19, 1934, the receivers asked leave of the District Court to file an ancillary bill of complaint against the claimants above named who had filed claims with the Special Master. The ancillary bill tendered for filing at that time alleged that claimants Hillman, Sheets and Watson as directors of Tower Hill had mismanaged the affairs of that corporation and had misapplied its assets in the payment of improper salaries and in the transfer of assets for the benefit of other corporations in which they were interested; that, as a result of their mismanagement, Hecla had received valuable property through an exchange with the Redstone Coal & Coke Co., to which Tower Hill was a party, and in the course of which Tower Hill had parted with property of great value and received property of insignificant value in return; and that the claim of the Hillman Company was based upon an arrangement between that company and Tower Hill growing out of the mismanagement of the latter by Hillman, Sheets, and Watson and that the Hillman Company was liable to the receivers for moneys which it had received pursuant to this arrangement. Most of the causes of action asserted in the ancillary bill appear not to have grown out of the transactions which were the basis of the claims filed with the receivers, but to constitute independent claims in behalf of the receivers against the claimants. The court ordered the ancillary bill filed, with leave to the defendants therein named, however,

to move to dismiss, answer or make such other defen
thereto as might be proper.

On March 19, 1934, a motion to vacate the order of cou
entered February 19, 1934, and to quash the service of th
order and the ancillary bill of complaint was filed by t
defendants named in the ancillary bill, each appearing sp
cially for the purpose of making the motion and witho
submitting to the jurisdiction of the court, but solely f
the purpose of questioning that jurisdiction. The reaso
assigned in the motion were that, at the time of the entry
[fol. 80] the order, the filing of the bill and the alleged ser
ice thereof upon each of the defendants, no one of the d
fendants was or had since been a citizen. resident or i
habitant of, or had been doing business within, the Sout
ern District of West Virginia, but that each of said d
fendants was a citizen, resident, and inhabitant of the ci
of Pittsburgh, in the Western District of Pennsylvania, a
that no legal service had been had upon any of them. Ea
of the defendants filed also a motion to quash the servi
of the ancillary bill and to dismiss it for want of juri
diction, on the same grounds as those alleged in the moti
filed in this cause. The Court sustained the motion a
dismissed the ancillary bill, finding that none of the defen
ants therein named was an inhabitant of the Southern Di
trict of West Virginia, but that each of them was at t
time of the filing of the bill and had since been a reside
of the Commonwealth of Pennsylvania. The receivers ha
appealed in both the original and the ancillary proceeding
but both appeals present the same question, viz., the correc
ness of the order dismissing the ancillary bill.

We think that the learned judge below was correct
holding that the court had not acquired jurisdiction
award any affirmative relief against the defendants nam
in the ancillary bill on the causes of action therein asserte
against them which constituted counterclaims to the clai
filed with the receivers, and not mere defenses to tho
claims. The question involved is not one as to the juri
diction of the court over the causes of action asserted in t
ancillary bill, for it is well settled that the courts of t
United States have jurisdiction to entertain either in equi
or at law as may be appropriate, ancillary proceedings
aid of a receivership suit pending in a federal court, ev
though other elements of federal jurisdiction, such as

versity of citizenship or the jurisdictional amount, may be lacking. White vs. Ewing, 159 U. S. 36; Pope vs. L. N. & A. C. R. Co., 173 U. S. 573; Kirkland vs. Knox, 230 Fed. 806; Carey vs. McMillan (C. C. A., 8th), 289 Fed. 380; Hart vs. Wiltsee, 19 Fed. (2d) 903; Hume vs. City of New York, 255 Fed. 488; Peck vs. Elliott, 79 Fed. 10. The question is whether the court acquired such jurisdiction over the persons who filed claims with the receivers as would authorize the granting of relief against them on counterclaims on which affirmative personal relief was asked and which were [fol. 81] not mere defenses to the claims filed; and we think it clear that this question must be answered in the negative.

The position of appellants is that these persons made themselves parties to the original cause by filing claims before the special master, and that no further service of process upon them, or consent to jurisdiction on their part, was necessary to give the court jurisdiction to award relief against them on the ancillary bill. The answer to this, however, is that under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause. Elkins vs. First Nat. Bank of the City of New York (C. C. A., 4th), 43 Fed. (2d) 777; Acme White Lead & Color Works vs. Republic Motor Truck Co., 285 Fed. 88; Jones vs. Laughlin & Sands (C. C. A., 2d), 79 Fed. 913; Youtsey vs. Hoffman, 108 Fed. 693; Sands vs. Greeley Co., 80 Fed. 195; Clark on Receivers, vol. 1, p. 717. And where an ancillary bill, as does the bill here, brings in new parties to the original suit and charges new matter as a basis of relief, the proceeding as against such new parties is an original, not an ancillary, proceeding, and they must be properly served with process to give the court jurisdiction. Duan vs. Clark, 8 Pet. 1; Smith vs. Norfolk, 115 U. S. 143, 148; G. & C. Merriman Co. vs. Saalfield, 241 U. S. 22; Manning vs. Berdan, 132 Fed. 382; Bowers vs. Christian, 16 Fed. 729; Hart vs. Wiltsee, supra.

A case very much in point is Whelan vs. Enterprise Trans. Co., 164 Fed. 95, a decision by Circuit Judge Lowell. That case involved a petition which was filed by a receiver of an insolvent corporation and was treated by consent as a plenary suit in equity ancillary to the principal receivership suit. Recovery was asked against one Paige for moneys collected by him which were alleged to be the property of the corporation. Paige had filed a claim with the receiver. The court held that, although the federal court

would have jurisdiction of an action against Paige as bei
ancillary to the main suit, the remedy at law was adequ
and suit in equity could not be maintained. The court c
sidered whether the fact that he had filed a claim with
receiver did not bring him within the jurisdiction of
court for the purpose of the collection of the receive
claim against him, saying:

[fol. 82] "The court has next to consider if the fact t
Paige filed a claim against the estate in the hands o
receiver appointed by a court of equity brings him wit
the jurisdiction of that court of equity for the purpose
the collection of the receiver's claim against him. T
Paige cannot obtain as matter of right a jury trial conce
ing his claim against the estate may be admitted, but fr
this it does not follow that he waives his right to a ju
trial in case of a claim brought by the receiver against hi
where that claim is made, not by way of set-off, but for
purpose of taking money out of Paige's pocket. Upon
whole, I think that Paige is right in this contention also

The decision of Judge Evans in Youtsey vs. Hoffm
108 Fed. 693, is also very much in point. In that case Ho
man and Feltman had filed a claim in a receivership s
in a state court. The receiver filed what he termed
"answer and set-off" asking recovery of damages agai
Hoffman and Feltman for mismanagement of the corpo
ton while acting as its officers. The action thus institut
was removed into the federal court and a motion to rema
it to the state court was denied on the ground that it w
a new and independent suit, separate and distinct fr
the receivership suit pending in the state court. Jud
Evans said:

As the receive in the case—the mere officer of the co
—was not then a party to the suit, it is clear that the p
mission given to him to file an answer and set-off in a s
to which he was not previously made a party was al
gether unauthorized and irregular. His pleading, und
the circumstances, even when coupled with the leave
the court, must therefore be regarded as the beginning
a new action, and its irregular injection into the one
ready pending cannot give it a higher value or better po
tion than an independent action would have done in det
mining the question now before us. * * * As the clai

filed by Hoffman were admitted to be just, thus closing the receiver's case as to them, and as there were new and distinct claims stated and set up in the so-called answer and set-off of the receiver, which had no connection with Hoffman's claims, due process of law manifestly required that [fol. 83] actual notice, in the way of the service of a summons, should be given to Hoffman in order to bring him before the court upon that pleading. • • • In other words, the receiver, merely as such, was never a party to the suit, unless the filing of the answer and so-called set-off made him a defendant without an express order of the court to that effect, which I doubt; and certainly the receiver, as such, was not entitled ex officio to plead therein any set off against Hoffman, who was at most, only a quasi party to certain other issues in the suit."

It is argued that the court has jurisdiction of the parties to pass upon the matters set up in the ancillary bill, because it is said that a claimant, by filing claim with a receiver and invoking the jurisdiction of the court for the adjudication of that claim, consents that the court adjudicate any claim which the receiver may have against him. The case is said to be analogous to a suit in equity in which the complainant, by filing the suit against the defendant, impliedly consents to being sued by way of counterclaim in a court which would not otherwise have jurisdiction of the cause of action therein asserted. See Equity Rule 30; Texas Co. vs. Borne Scrymser Co. (C. C. A., 4th), 68 Fed. (2d) 104; and General Electric Co. vs. Marvel Rare Metals Co., 287 U. S. 430, in the last of which the Supreme Court said: "The setting up of a counterclaim against one already in a court of his own choosing is very different, in respect to venue, from hailing him into that court."

One filing a claim with a receiver, however, is in a very different position from one who has filed a bill in equity. He is not in a court of his own choosing, but in a court selected by others, which has taken into its possession the only property from which he can obtain payment of his claim. The complainant who files a bill in equity, and thus subjects himself to equitable counterclaims of the defendant, has had the option of going into either the state or federal courts and of suing in any district in which jurisdiction of the defendant can be obtained. The claimant who files claim with a receiver, on the other hand, has had no

option whatever. Unless he promptly files his claim
the court which has taken jurisdiction of the property,
right to share in the distribution of that property wil
gone; and that court passes upon his claim, without reg
[fol. 84] to citizenship, the amount involved, or other ju
dictional requirements, merely because of the neces
arising out of the fact that it has taken possession of p
erty. The claimant in such case files his claim in the
ceivership suit in order that he may obtain his equit
portion of the property in receivership upon its distribu
by the court; and, as we said in a former opinion her
he makes himself a party to the cause pro hac vice, i
merely for the purpose of having his claim allowed an
sharing in the distribution of the property in which
claims an interest because of the receivership. He has
equitable interest in the property which is in the hand
the receiver; and his position, in so far as coming into
receivership suit for the assertion of his rights is concer
is more nearly analogous to that of a person whose p
erty has been attached, and who must appear and def
for the protection of his interest in the property, tha
that of a complainant who has voluntarily gone into a c
and filed a bill in equity. To permit the receiver to as
in the receivership suit an independent cause of actio
law or in equity against such claimant, or to recover
counterclaim against him merely because he has filed
claim in the receivership suit, would be as unfair a
permit a plaintiff in an attachment suit to amend his c
plaint to allege a new and different cause of action aga
a defendant in attachment, or to permit a non-resident,
has appeared to defend a suit on one cause of action, t
subjected while in the jurisdiction to suit on another
independent cause of action. It is well settled that, i
attachment suit, it is not permissible to amend the pl
ings to set up a new cause of action (6 C. J. 482), and
one who comes into the jurisdiction of a court for the
tection of his interest in litigation there pending is
mune from service of process in another suit. Page
vs. McDonald, 261 U. S. 446; Stewart vs. Ramsey,
U. S. 128.

In so far as the matters set up in the ancillary bill
stitute causes of action at law, there is an additional
son why they may not be asserted in the receivership

That suit is a proceeding in equity; and the claims filed by claimant and any counterclaims thereto would necessarily be heard in equity. The claimants, by filing their claims in a court of equity, waive their right of jury trial with respect to the claims filed, but they do not waive such right [fol. 85] with respect to independent claims against them which the receivers may seek to assert by way of counterclaim. It is well settled that a counterclaim involving a cause of action at law cannot be asserted in a suit in equity, because of the right of the party against whom it is asserted to a jury trial under the Seventh Amendment to the Constitution. American Mills Co. vs. American Surety Co., 260 U. S. 360; Sinclair Refining Co. vs. Midland Oil Co. (C. C. A., 4th), 55 F. (2d) 42, 47.

For the reasons stated, we think that the court below was without such jurisdiction of the parties as would authorize it to adjudicate the counterclaims asserted in the ancillary bill or to grant any affirmative relief with respect thereto. It did have jurisdiction, however, to pass upon any defense, legal or equitable, which might be asserted against the claims filed with the receivers, and to stay action upon those claims until the counterclaims asserted in the ancillary bill could be adjudicated in a court of competent jurisdiction so that they could be set off against the claims, or the amounts payable thereunder, as might be proper. We think, therefore, that, instead of dismissing the ancillary bill, the court below should have retained it, treating it as a petition to stay action on the claims until the counterclaims therein asserted could be adjudicated in a court of competent jurisdiction, and as setting up defenses to the claims in the cases where the matters alleged could be considered as purely matters of defense as distinguished from counterclaims. The order appealed from will accordingly be modified and the cause will be remanded to the end that the court below may give consideration to the question of staying action on the claims pending the adjudication of the counterclaims in a court of competent jurisdiction, and that it may consider any matter set up in the bill which may appropriately be considered as matter of defense against the claims filed. The court should require, however, that new pleadings be filed in lieu of the ancillary bill, setting up as against each claim filed with the receivers any purely defensive matter which the receivers may desire to assert,

together with any matter which would justify the court in staying action on the claims pending the adjudication of any counterclaim or counterclaims in a court of competent jurisdiction. Modified.

[fol. 86] In United States Circuit Court of Appeals

Separate Opinion

Soper, Circuit Judge:

I concur in the general conclusion of the court that a receiver in equity is entitled in certain contingencies to resist the payment of claims against the estate by the presentation of set-offs or counterclaims against the claimants. The opinion holds in effect that the equity court has jurisdiction: (1) to pass upon a legal or equitable defense to a claim which grows out of the same transaction and is not in excess of the amount of the claim; (2) to stay action on a claim, if a meritorious set-off or counterclaim in law or equity, growing out of the same transaction is alleged, and affirmative relief against the claimant is sought, until adjudication may be had in an independent suit brought by the receiver against the claimant; (3) to stay action on a claim, if a meritorious set-off or counterclaim in law or in equity, growing out of an independent transaction, is alleged, until adjudication may be had in an independent suit brought by the receiver against the claimant.

In my opinion, the jurisdiction of the court to consider a set-off or counterclaim filed by a receiver is even broader. It should be held that the equity court also has jurisdiction (1) to adjudicate fully any set-off or counterclaim in law or equity, growing out of the same transaction, and to grant affirmative relief to the receiver if the facts warrant such action; and (2) to adjudicate any set-off or counterclaim in equity, based on an independent transaction, and to grant affirmative relief to the receiver if the facts warrant such action.

It seems clear that the court has full power to adjudicate completely all set-offs or counter-claims growing out of the same transaction, and the efficient administration of justice requires it, if it can be done in accordance with the federal

constitution. Power to pass upon the merits of a claim, and to consider all defenses growing out of the same transaction to the amount of the claim, is conceded. The limitation implied seems to be unwarranted, and no authority is cited to sustain it. Courts of equity in the administration of estates have long exercised jurisdiction to consider claims presented against the property in their charge, and this function obviously cannot be fully performed, unless all defenses to a claim growing out of the transaction on which the claim is based, whether in excess of the claim or not, [fol. 87] may be considered. The right to adjudicate fully all defenses is inherent in the power to adjudicate the claim. The fact that the claimant is deprived of a jury trial presents no constitutional difficulty; for the proceeding is in equity, and the claimant may not demand a jury trial even though his claim is based upon a right of action at law; and as to the set-offs or counterclaims presented by the receiver, the court of equity, having acquired jurisdiction, will retain it, in accordance with the well established principle of equity jurisprudence, until the whole controversy has been disposed of, although rights of action are involved which ordinarily would be cognizable only in a court of law. It may be noted in passing that the opinion of the court does not question the power of the chancellor to pass on the merits of a legal defense to a claim not in excess of the claim itself.

Furthermore, there seems to be no important reason why Equity Rule 30, promulgated November 4, 1912, should not be applied to the situation which arises when a receiver has a set-off or counterclaim in equity, growing out of an independent transaction, against a claimant. This rule provides in substance that the defendant in his answer to a suit in equity may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim shall have the same effect as a cross suit; so as to enable the court to pronounce a final decree in the same suit on both the original and the counterclaim. By the passage of this rule, the Supreme Court, in order to make it possible to put an end to all controversies between the same parties in a single suit, changed the former practice which confined set-offs and counterclaims to those which arose out of the transaction that formed the

basis of the original suit. Since the filing of a disputed claim against a receiver in an equity proceeding is in one aspect a separate suit, it falls within the scope of Equity Rule No. 30, and the receiver should have the same right to set-off or counterclaim as would have been accorded to the corporation before the receiver was appointed. The decisions relied on in the opinion of the court, Whelan vs. Enterprise Trans. Co., 164 F. 95, and Youtsey vs. Hoffman, 108 F. 693, were rendered prior to the passage of the rule. It would be of great convenience if independent counter-[fol. 88] claims at law might also be adjudicated in the same proceeding, but the Seventh Amendment stands in the way. American Mills Co. vs. American Surety Co., 260 U. S. 360.

The suggestion that this form of procedure would be unfair to the claimant, because it would require him to meet a counterclaim in a jurisdiction not of his choice, should not prevail. A suitor is always compelled to bring a suit in the court which has jurisdiction over the defendant, and in many instances, there is only one court available for the purpose. His choice of courts may be more restricted when his claim must be filed in a receivership proceeding, but the importance of winding up the affairs of an insolvent corporation, under the supervision of a single court, is so great that this result cannot be avoided. Indeed, in cases of receivership, there is an added reason to that which led the Supreme Court to promulgate Equity Rule No. 30. When an estate is being wound up by a receiver under the supervision of a court of equity, there is more involved than the right of any claimant; and controversies between the receiver and the claimants should be adjudicated expeditiously, so that the estate may be speedily liquidated and all the creditors may receive their proportionate shares.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3736

A. S. ALEXANDER, H. D. RUMMEL, and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Appellants,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and Hecla Coal and Coke Company, a Corporation, Appellees

DECREE—Filed and Entered January 23, 1935

[fol. 89] Appeal from the District Court of the United States for the Southern District of West Virginia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, modified as set forth in the opinion of the Court filed herein; that this cause be, and the same is hereby, remanded to the District Court of the United States for the Southern District of Wset Virginia, at Charleston, for further proceedings in accordance with the opinion of this Court; and that the costs on this appeal be divided equally between the parties.

January 23, 1935.

Elliott Northcott, U. S. Circuit Judge.

In United States Circuit Court of Appeals

Petition of Appellants for Rehearing and for Order Staying Mandate—Presented February 19, 1935

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

The petition of A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, respectfully represents:

[fol. 90] (1)

Your petitioners are the Appellants in the above-entitled case.

(2)

January 22, 1935, your Honorable Court rendered a decision in the above-entitled case modifying a decree of the District Court of the United States for the Southern District of West Virginia, which dismissed an ancillary bill of complaint filed by Appellants, your Honorable Court holding that the bill should be retained for certain purposes stated in the opinion, but that the Court had no jurisdiction to grant affirmative relief against Appellees.

(3)

Your Honorable Court held that the question is whether the Court below acquired such jurisdiction over the persons of Appellees as authorized the granting of affirmative relief against them.

The opinion answers this question negatively.

In stating the question, Appellees are described as persons who filed claims with the Receivers, and in answer to the proposition of Appellants it is said (6):

"The answer to this, however, is that under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause."

Appellants respectfully suggest that this statement of what was done by Appellees is too narrow. They did not file claims or proofs of claims with the Receivers but actually presented them and offered testimony in support of

them in court in a proceeding in the Primary Cause, as is set out in detail in Appellants' Brief, pages 35-40. Appellants' position is that had what occurred before the Special Master taken place in a proceeding in which the Chancellor was himself sitting, there could be no room for dispute that Appellees appeared in the cause, and in their [fol. 91] judgment that result is in no way minimized by the fact that it occurred before a Master and not the Chancellor in person.

The question in final analysis resolves itself into an inquiry whether what Appellees did amounts to a submission to the jurisdiction of the Court below. In the light of well established principles, the answer to that inquiry is to be found in what they did.

The test of submission is whether the party becomes an actor: Merchants Heat & Light Co. vs. Clow, 204 U. S. 286; 51 L. Ed. 488. The term "actor" is self-defining and means that when any person comes into a pending cause seeking relief through the medium thereof he becomes an actor therein.

It is definitely settled by the case cited that when a person seeks relief by setting up a counter-claim he becomes an actor and by so doing submits to the jurisdiction. A person setting up a counter-claim occupies a position quite analogous to that of Appellees. A person setting up a counter-claim seeks to recoup against the claim asserted against him or to recover a balance. Here Appellees, through the medium of the pending proceeding, seek the advantages of the decree creating the fund and to recover in virtue of a further decree of the Court below. Appellants believe that Appellees became actors in the cause and thereby submitted to the jurisdiction of the Court below, and they with due respect submit that the opinion of your Honorable Court does not give to this consideration the weight and effect to which it is entitled.

(4)

The opinion cites in support of its answer to Appellants' position—

Elkins vs. First National Bank, 43 F. (2d) 777.

Acme White Lead & Color Works vs. Republic Motor Truck Co., 285 Fed. 88.

Jones & Laughlin vs. Sands, 79 Fed. 913.
Youtsey vs. Hoffman, 108 Fed. 693.
Sands vs. Greeley Co., 80 Fed. 195.

[fol. 92] In the ultimate analysis, each of these cases is reduced to a mere question of procedure. Not one of them involves submission to jurisdiction or any similar inquiry.

The Elkins case denied a petition to intervene on the ground that the petitioners were already in a position to assert any claim they desired to make, and in the opinion on the petition for reargument it was pointed out that the petition did not state a good cause of action.

The Acme case is to the same effect. Intervention was denied because the petitioner could obtain full remedy before the Master, without intervention.

The Jones & Laughlin case involves an immature appeal, there having been no final judgment, but the implications of the opinion are rather in favor of Appellants in that it is held that persons having filed claims can appeal from any final decree adverse to them.

The Greeley case is the Jones & Laughlin case in the lower court.

The Youtsey case was one peculiar to the law of Kentucky and in it the Receivers were not treated as parties, while here it is conceded by Appellees and recognized by the opinion of your Honorable Court that they are parties. Furthermore, the Court held that the claim there asserted was not a counter-claim or set-off within the meaning of the Kentucky statute, while here the claim asserted by Appellants is clearly in equity within the meaning of Federal Equity Rule 30.

Your Honorable Court also refers to Whelan vs. Enterprise Transportation Co., 164 Fed. 95. The Court there declined to follow Peck vs. Elliott, 79 Fed. 10, because the claim was a legal one and not cognizable in equity. That question is here irrelevant for, as will appear by an inspection of the ancillary bill, every cause of action set up is of purely equitable character and a court in equity would have had jurisdiction wholly regardless of the receivership.

(5)

Your Honorable Court also holds that when an ancillary bill brings in new parties they must be properly served

with process to give the court jurisdiction, and cites cases.

[fol. 93] Appellants do not dispute that proposition, but their position is that it is inapplicable because the parties were already in court and therefore no question of bringing them in is involved.

Every reason supporting the rule that the court having possession of a res has jurisdiction to adjudicate not only claims to the res but claims of the res against third persons, and every principle out of which it was developed, strengthens Appellants' position on this point. The fundamental idea underlying that jurisdiction is the desirability, if not necessity, of having the whole controversy settled in a single proceeding, and it is just as logical to hold that when persons come into the court to deal with that subject matter they submit themselves to the jurisdiction of that court, as is the rule itself that the court has jurisdiction to adjudicate claims against third persons. It is in perfect harmony with the well known principle that when equity acquires jurisdiction of a portion of a controversy it obtains jurisdiction to determine the whole of the controversy, even if some of the questions are of a legal character: Hartford Accident & Indemnity Co. vs. Southern Pacific Co., 273 U. S. 207; 71 L. Ed. 612. Here, however, only equitable controversies are involved.

Furthermore, the proposition of Appellants, if not strictly within the letter, is within the spirit of Equity Rule 30.

(6)

The opinion of your Honorable Court says (10):

"The claimants, by filing their claims in a court of equity, waive their right of jury trial with respect to the claims filed, but they do not waive such right with respect to independent claims against them which the receivers may seek to assert by way of counter-claim."

Appellants respectfully suggest that no question of waiver of trial by jury or interference with the right of trial by jury is here involved, for the reason, already pointed out, that their claims, as pleaded in the ancillary bill, are of an equitable nature, cognizable in a court in

[fol. 94] equity and, had there been no receivership, could have been asserted by Tower Hill itself in a court in equity. As respects Appellee, Hillman Coal and Coke Company, Appellants' claim simply involves a complicated accounting. The claim against Hecla Coal and Coke Company arises out of a breach of trust. The claims against the other Appellees arise out of their breaches of trust as officers and directors of Tower Hill and their fraudulent mismanagement of its business and affairs.

(7)

Finally, the opinion states (9):

"One filing a claim with a receiver, however, is in a very different position from one who had filed a bill in equity,"

because, as is said, he is not in a court of his own choosing but in a court selected by others.

This subject is presented at some length in Appellants' Brief (pages 20-23).

The law fixes the court or courts in which one person may sue another. Generally speaking, there is only one tribunal. If there be more than one, it is only because the law attaches that effect to exceptional circumstances, such as the fact that defendant is found or is doing business in a jurisdiction other than that of his domicile. In the first instance, there is no choice; in the latter, the choice is restricted and limited.

It is the law, and not any selection of Tower Hill or its Receivers or any other person, that vests in the District Court of the United States for the Southern District of West Virginia exclusive jurisdiction of claims against Tower Hill. It is just as competent for the law to restrict a claimant to one tribunal as it is for the law to enable him, in certain circumstances, to have a restricted choice of two or more.

Whether Appellees would go in or stay out of the Court below was purely volitional. If it be said that they would have stayed out at the risk of losing their claims, the answer is that they would have been in no different position than any other suitor. If the law decrees that there is but [fol. 95] one tribunal open to a suitor, he must enter that court and assume the risk of counter-claim or abandon his own claim. If by reason of exceptional circumstances more

than one tribunal is open to him, he still must make his election. Will he abandon his claim or will he run the risk of counter-claim in the court in which he determines to assert his own claim? In any event, if he elects to assert his claim he must face the risk of counter-claim in a court in which the law prescribes the defendant may be sued.

Appellants respectfully submit that in appearing before the Special Master in the Court below and asserting their claims, Appellees were in no different position than if they had filed a bill in equity against Tower Hill in a court in which the law prescribed Tower Hill could be sued. When the receivership of Tower Hill occurred and thereby there was vested in the receivership court the exclusive jurisdiction over claims against it, Appellees were in exactly the position of one who has a claim against another. They could assert their claims where the law prescribed Tower Hill and its assets could be found and in so doing assume the risk of whatever result their action entailed. They could abandon their claims, and if the Receivers pursued them in a court to whose process they were subject, they could there assert their own claims as counter-claims. They chose the former course, and while your Honorable Court has properly recognized their just right to appear in the Court below, fully establish their own claims, challenge the claims of others, appeal from any decision of the Chancellor, and participate in the distribution of the assets in accordance with the final decree, you have granted them exemption from liability to counter-claim. The result, it seems to Appellants, is not in harmony with precedent or principle. Whether Appellees be termed formal parties or quasi parties or by whatever other term they may be designated, the fact remains that they are in the Court below asserting claims against Tower Hill and seeking distributions from its funds just as fully, for any and every purpose, as if they had filed a bill in equity against Tower Hill.

Appellants respectfully submit that there is no sound reason in principle or authority why a claimant should be granted exemption from counter-claim simply because the [fol. 96] counter-claimant is in receivership when the law clearly denies such exemption if the receivership did not exist. Tower Hill's counter-claims being of equitable cognizance, their adjudication by the receivership Court is in

exact accord with the spirit and purpose of Equity Rule 30.

(8)

Reference is made in the opinion to General Electric Co. vs. Marvel Rare Metals Co., 287 U. S. 430, in which it is said:

"The setting up of a counter-claim against one already in a court of his own choosing is very different, in respect to venue, from haling him into that court."

This case dealt with waiver of venue, and to bring a voluntary appearance in contrast with compulsory process was the purpose of the part of the opinion quoted. This case was cited by Appellants in their Reply Brief, and they respectfully submit that while it deals only with venue, which Appellees insisted was the only question here involved, its reasoning and the ratio decidendi sustains the contention of Appellants.

Wherefore petitioners pray that a rehearing may be allowed in the said appeal and that the mandate be stayed pending the disposition of this petition.

Edwin W. Smith, Arthur S. Dayton, E. C. Higbee,
Wm. M. Robinson, Counsel for Petitioners.

We hereby certify that the above petition for a rehearing is presented in good faith and not for the purpose of delay, and further, that in our opinion the petition is well founded, and the petitioners are entitled to a rehearing.

Edwin W. Smith, Arthur S. Dayton, E. C. Higbee,
Wm. M. Robinson, Counsel for Petitioners.

[fol. 97] In United States Circuit Court of Appeals

Order Staying Mandate—Filed February 27, 1935

Upon the petition of the Appellants, by Edwin W. Smith, Arthur S. Dayton, E. C. Higbee and Wm. M. Robinson, their counsel, and it appearing to the Court that the Appellants have presented a petition for a rehearing in this cause,

It is ordered that the mandate of this Court in the above-entitled cause be, and the same is hereby, stayed pending the action of the Court upon the said petition of the Appellants for a rehearing.

February 27, 1935.

John J. Parker, Senior Circuit Judge.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—Filed and Entered March 2, 1935

[fol. 98] This court having at its January term, 1935, rendered its decision modifying the order of the said District Court appealed from in this cause, and the appellants having on February 19, 1935, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

It is now here ordered by this court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days from this date.

March 2, 1935.

John J. Parker, Senior Circuit Judge.

March 5, 1935, petition of appellants for stay of the mandate pending application in the Supreme Court for a writ of certiorari is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING APPLICATION FOR A WRIT OF CERTIORARI—Filed March 6, 1935

Upon the application of the Appellants, by their counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above cause be, and the same is hereby, stayed pending the application of the Appellants in the Supreme Court of the United

States for a writ of certiorari to this Court, unless otherwise ordered by this Court or the Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

March 6, 1935.

John J. Parker, Senior Circuit Judge.

[fol. 99] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 100] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 6, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,459. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 15. A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers, etc., Petitioners, vs. J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, et al. Petition for a writ of certiorari and exhibit thereto. Filed April 1, 1935. File No. 15 O. T. 1935.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 16

A. S. ALEXANDER, H. D. RUMMEL AND GEORGE S. BATON, AS RECEIVERS, ETC., PETITIONERS,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 1, 1935.

CERTIORARI GRANTED MAY 6, 1935.

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[fol. 1] [Caption omitted]

[fol. 2] **IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA**

In Equity. No. 3370

A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation,

vs.

J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Compnay, a Corporation, and Hecla Coal and Coke Company, a Corporation

Ancillary Bill of Complaint—Filed Feb. 19, 1934

To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation (hereinafter called "Receivers" and "Tower Hill" respectively) bring this, their Ancillary Bill of Complaint, against J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal Company, a corporation (hereinafter called respectively "Hillman", "Sheets", "Watson", "Hillman Company" and "Hecla" and together hereinafter sometimes referred to as "Defendants"), and for their cause of action the Receivers state:

1. In a cause pending in your Honorable Court at No. 1434 in Equity, wherein Piedmont Coal Company, a corporation, and others are plaintiffs and Tower Hill is defendant (hereinafter referred to as the "Primary Cause"), your Honorable Court, on August 25, 1932, entered its decree (hereinafter referred to as the "Primary Decree"), wherein and whereby it is ordered, adjudged and decreed, [fol. 3] inter alia, that the business and affairs of Tower Hill be terminated and wound up, that its properties and assets be sold and converted into money and that distribution

thereof be made to its creditors and stockholders according to their respective rights and priorities, and in order to effect said termination and winding up and the sale, conversion and distribution of said properties and assets, the Receivers were appointed as Receivers of all the properties and assets of Tower Hill of whatsoever character and wheresoever situate, and were particularly authorized, empowered and directed, among other things, to have, take and receive all said properties and assets of Tower Hill and to institute and prosecute all suits and proceedings necessary to recover possession of all and singular said properties and assets and every part thereof and otherwise to effectuate the provisions of said decree and thereupon the Receivers qualified as such Receivers in accordance with the provisions of said decree and since then have been and are now engaged in the exercise of the authorities and the discharge of the duties of their appointment. By reference, the record of the Primary Cause, and particularly the Primary Decree, are made a part hereof with like effect as if herein set out in extenso; and this Bill of Complaint is filed as ancillary thereto and for the purpose of effectuating the provisions of the Primary Decree.

2. By decree of your Honorable Court entered in the Primary Cause on December 12, 1933, J. E. Campbell, Esq., was appointed Special Master in Chancery to take, state and report an account showing all the debts, obligations and claims against Tower Hill, the owners of its preferred and common stock and such other matters as said Master may deem pertinent.

3. At a hearing held by said Master in Charleston, West Virginia, on January 30, 1934, the Defendants each appeared and made proof of certain claims wherein and whereby they asserted and attempted to establish a right to participate in the distributon of the funds in or to come into the hands of the Receivers, each of which remains pending and undetermined, the nature whereof is as follows:

(a) Hillman claims $250.00 as salary as President of Tower Hill for the month of October, 1933;

[fol. 4] (b) Watson claims $250.00 as his salary as Secretary of Tower Hill for the month of October, 1933, and the sum of $33,500.00 as a balance for professional services asserted to have been rendered by him to Tower Hill;

(c) Hillman and Sheets claim the sum of $105,000.00 as sureties upon the supersedeas bond filed on the appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the Primary Decree;

(d) Hillman Company claims the sum of $2,720.03 on account of what it asserts is Tower Hill's share of expense pools consisting of various operating, engineering, general office and sales offices expenses, which, by some sort of an arrangement, of which Receivers do not have knowledge, were apportioned by the Hillman Company as Pool Manager among a large number of corporations owned or controlled by Hillman and Sheets, of which Tower Hill was one; and

(e) Hecla claims to be the owner of 2037 shares of the preferred stock and 2451 shares of the common stock of Tower Hill.

The Receivers deny the claims of Hillman, Watson, Hillman and Sheets, and Hillman Company and have objected thereto before the Special Master, and deny the right of Hecla to participate and share in the said distribution. The validity of said claims and the respective rights, obligations and liabilities of the Receivers and the Defendants can be ascertained only by an adjudication not only of said claims but also of claims, hereinafter stated in detail, asserted by the Receivers against the Defendants, and this Ancillary Bill is filed in order that each and all of said claims—those so asserted by the Defendants as well as those, hereinafter set forth, asserted by the Receivers—may be together considered and adjudicated by your Honorable Court and thereby the respective rights, obligations and liabilities of the Receivers and the Defendants may be finally and conclusively determined.

4. Continuously since May, 1920, Hillman, Sheets and Watson have been directors of Tower Hill and of Tower [fol. 5] Hill Connellsville Coke Company, a corporation created under the laws of Pennsylvania (hereinafter called "Tower Hill of Pennsylvania"), all of whose stock is, and during all said period was, owned by Tower Hill. Continuously since June, 1920, they have also been directors of Eastern Coke Company, also a corporation created under the laws of Pennsylvania (hereinafter called "Eastern

Coke"), a majority of whose stock originally and later all, was owned by Tower Hill of Pennsylvania. In August, 1929, Eastern Coke conveyed and transferred all its property of every kind to Tower Hill of Pennsylvania and in January, 1930, Tower Hill of Pennsylvania conveyed and transferred all its property of every kind to Tower Hill, so that, upon the appointment of the Receivers, all rights and interests of said three corporations became vested in the Receivers. Continuously during said respective periods Hillman was President, Sheets Vice President or Treasurer, and Watson Secretary of each of said three corporations, and a majority of the directors of each were the same persons and were the nominees and, for all practical purposes, merely the employees of Hillman. Hillman, through the medium of intermediate stock ownership, indirectly controlled the majority stock of Tower Hill, absolutely dictated the policies, management and business of each of said corporations, and completely dominated their affairs. Sheets and Watson, as directors and officers of each of said three corporations, acquiesced in and approved of such domination and lent their assistance in carrying it into effect.

5. From January, 1930 to June, 1930, both inclusive, Hillman as President, Sheets as Vice President or Treasurer, and Watson as Secretary of Tower Hill, each with the knowledge and without the objection of the others, under the guise of salaries as such officers, severally drew out of its funds large sums of money, to-wit, Hillman $500.00 per month, Sheets $500.00 per month and Watson $250.00 per month; and from July, 1930 to September, 1933, both inclusive, they severally in like manner drew out of the funds of Tower Hill $250.00 per month. Said withdrawals were not authorized by any corporate action, and the Receivers are advised and therefore charge that all such withdrawals were and are illegal and unlawful disbursements and appropriations of the [fol. 6] fund of Tower Hill. During the said period Tower Hill was doing substantially no business, the services rendered were little more than nominal, and the amounts of the withdrawals were extravagant, unreasonable and wholly disproportionate to the worth of any services rendered by said officers or any of them. The Receivers are advised and therefore charge that Hillman, Sheets and Watson are liable to the Receivers for the repayment of all sums of money so

illegally received by them respectively, and for such repayment demand is hereby made.

6. From May, 1920 to December, 1929, Hillman, Sheets and Watson, each with the knowledge and without the objection of the others, monthly drew out of the funds of Tower Hill of Pennsylvania large sums of money under guise of salaries as President, Vice President or Treasurer, and Secretary, respectively. Such withdrawals were not authorized by any corporate action, and the Receivers are advised and therefore charge that all such withdrawals were and are illegal and unlawful disbursements and appropriations of the funds of Tower Hill of Pennsylvania. The amounts so withdrawn were extravagant, unreasonable, and wholly disproportionate to the worth of any services rendered by said officers or any of them. The right to recover the amounts so unlawfully withdrawn from Tower Hill of Pennsylvania has become vested in the Receivers in the manner hereinbefore stated and for the repayment thereof the Receivers are advised and therefore charge that Hillman, Sheets and Watson are liable, and for such repayment demand is hereby made.

7. From July, 1920 to August, 1929, Hillman, Sheets and Watson, each with the knowledge and without objection of the others, monthly drew out of the funds of Eastern Coke large sums of money under the guise of salaries as President, Vice President or Treasurer, and Secretary, respectively. Such withdraws were not authorized by any corporate action, and the Receivers are advised and therefore charge that all such withdrawals were and are illegal and unlawful disbursements and appropriations of the funds of Eastern Coke. The amounts so withdrawn were extravagant, unreasonable and wholly disproportionate to the worth [fol. 7] of any services rendered by said officers or any of them. The right to recover the amounts so unlawfully withdrawn from Eastern Coke has become vested in the Receivers in the manner hereinbefore stated and for the repayment thereof the Receivers are advised and therefore charge that Hillman, Sheets and Watson are liable, and for such repayment demand is hereby made.

8. On or about July 30, 1930, Hillman caused Tower Hill to draw and deliver to Emerald Coal & Coke Company, a corporation of the State of Delaware (hereinafter called "Emerald"), its voucher for $1,150,000.00, and on or about

August 3, 1930, its second voucher for $34,000.00. At or about that time there was delivered to Tower Hill, and there is now in possession of the Receivers, a certificate purporting to represent 11,840 shares of the capital stock of Emerald of the par value of $100.00 each and aggregating at par $1,184,000.00. Each of said vouchers was in due course paid out of the funds of Tower Hill. Said transaction and the drawing and payment of both of said vouchers were unauthorized and were had and done without any corporate action whatsoever. Sheets and Watson knew of said transaction and of the issuance and delivery of said vouchers at the time thereof, made no objection or protest and took no action to protect the interests of Tower Hill.

9. In order to raise funds to pay said vouchers, Hillman caused Tower Hill to sell high-grade income producing securities, for the most part at substantial losses, whereby the income of Tower Hill was greatly reduced. Sheets and Watson knew of said sales, made no objection or protest and took no action to protect the interests of Tower Hill.

10. At the time of said transaction, the stock of Emerald had never paid any dividends, gave no signs of ability so to do within any reasonable time in the future, and was wholly without any market value and of doubtful intrinsic worth. The sole asset of Emerald, aside from an insignificant amount of cash, was 100 shares of the capital stock of Emerald Coal Company, a Pennsylvania corporation, being all the outstanding shares of that Company. Substantially the only asset of Emerald Coal Company was something less than [fol. 8] 10,000 acres of undeveloped coal in Greene County, Pennsylvania, which it had been carrying for twenty-five years and upwards. Emerald and its subsidiary, Emerald Coal Company (hereinafter collectively referred to as "Emerald"), had a mortgage indebtedness of $875,000.00 held by banking interests with which Hillman was connected, and outstanding notes in excess of $430,000.00 for moneys loaned by its stockholders. Emerald never had any gross income; the carrying charges of the property, aggregating more than $2,000,000.00, had been provided by its original stockholders in part by loans and in part by the purchase of additional shares; to maintain the book value of its stock at par these enormous carrying charges were capitalized; it was in a precarious financial condition. Said tract of coal was not marketable and Emerald did not have and had no

means of acquiring the funds necessary for its development. If it had been developed, it could not have been profitably operated.

11. At the time said transaction was entered into and the moneys of Tower Hill so expended, Hillman was obligated on a personal contract with Emerald to purchase 9,000 shares of Emerald stock for $900,000.00, and said transaction as shifted to Tower Hill by Hillman in relief of his own liability and in discharge of his own obligation. Sheets and Watson knew of Hillman's personal obligation, made no objection or protest to the shift of it to Tower Hill and took no action whatever to protect Tower Hill's interests.

12. Said transaction was consummated at a time when Hillman, Sheets and Watson were fully advised of the intention of plaintiffs in the Primary Cause to file an Amended and Supplemental Bill charging fraudulent mismanagement of Tower Hill and praying for the winding up of its business and affairs. It was effectuated without any notice to your Honorable Court or to the plaintiffs in the Primary Cause, and it did not come to their knowledge until more than fourteen months after the transaction had been fully consummated.

13. The funds of Tower Hill were so expended in said Emerald transaction through the dominating influence and absolute control of Hillman in the affairs of Tower Hill, and all the facts were known to Sheets and Watson, who notwith-[fol. 9] standing made no objection or protest and took no action to protect the interests of Tower Hill. The expenditure of said funds was, Receivers are advised, a misappropriation of the moneys and assets of Tower Hill, was made for the monetary gain and advantage of Hillman and to exonerate him from the obligations of a personal contract, and constitutes mismanagement of the corporate affairs of Tower Hill of a gross and fraudulent character.

14. Receivers are advised and therefore charge that Hillman, Sheets and Watson are legally liable to make good the funds of Tower Hill dissipated and misapplied in the acquisition of the Emerald stock. Receivers being in possession of said shares, are ready and willing to return them to Hillman, Sheets and Watson, or any of them, upon their making good the funds so fraudulently dissipated with interest, and hereby demand therefor is made.

15. Hillman, Sheets and Watson are, and during all the times mentioned in the record in the Primary Cause and herein were, directors of Tower Hill, Hillman Company and Hecla, and a number of other corporation the names of all of which are not know- to Receivers but some of which they believe to be Hillman Transportation Company, Hillman Supply Company, Thompson-Connellsville Coke Company, Fayette Investment Company, Orenda Coal Company, General Water Company and Vulcan Real Estate -ompany, Hillman being President, Sheets Vice President or Treasurer and Watson Secretary of each of them. The majority directors and officers of Tower Hill, Hillman Company, Hecla and all said other corporations were the same persons and were the nominees and for practical purposes merely the employees of Hillman. He was the controlling head and dominating influence in all said corporations. Their principal offices were in the First National Bank Building, Pittsburgh, Pennsylvania, in the same suite in which were the private offices of Hillman, Sheets and Watson used by them in the conduct of their personal affairs, and also the principal offices of a number of other corporations controlled and dominated by Hillman. In the conduct of the affairs and the transaction of the business of said corporations and individuals, numerous persons were em- [fol. 10] ployed in common as assistant-, stenographers, accountants, bookkeepers and clerks. The compensation of all such employees, the rent of said suite of offices and the other expenses incident to the conduct of said various businesses in said suite were paid by the Hillman Company under some sort of a pool arrangement and by it, as the pool manager and under the supervision of the individual Defendants, were apportioned among the various corporations referred to or some of them, including Tower Hill, in such respective amounts as Hillman and Sheets from time to time determined. So far as Receivers are advised, no part of said expenses has been charged against Hillman, Sheets and Watson or any other individuals occupying said offices and using said facilities.

During all said times the Hillman Company also maintained a sales department with offices not only in said suite in Pittsburgh, Pennsylvania, but in various other places, in and from which employees were engaged. The compensation of all such employees, the rent of all such sales of-

fices and the other expenses incident to the operation of said sales department were in like manner apportioned among said corporations, or some of them, including Tower Hill, by the Hillman Company as pool manager and in accordance with directions from time to time given *up* Hillman, Sheets and Watson.

The Hillman Company also maintained what it termed an operating department, consisting of various operating employees, and an engineering department, in which were employed a number of engineers. The compensation of all such employees and all the expenses incident to the performance of their work were likewise apportioned among said corporations, or some of them, including Tower Hill, by the Hillman Company as pool manager and in accordance with directions from time to time given by Hillman, Sheets and Watson.

16. Said claim of the Hillman Company for $2,720.03, filed with said Special Master in the Primary Cause (being marked "Exhibit Hillman Coal & Coke Company Proof of Claim"), is Tower Hill's apportionment of said expense pools mentioned in the preceding paragraph hereof for the month of October, 1933, as made by the Hillman Company under the direction of Hillman, Sheets and Watson.

[fol. 11] 17. On account of said apportionments of said expense pools referred to in paragraph 15 hereof, Tower Hill from time to time made large payments, the aggregate whereof, considering the nature, character and extent of its business, far exceeded the fair, reasonable and conscionable expenditures for such purposes and constituted improvident, exorbitant, unnecessary and fraudulent waste and misappropriation of the moneys and funds of Tower Hill. All this was done, as Receivers believe and charge, for the benefit of the individual Defendants in the conduct of their personal affairs and also for the advantage of some of the other corporations in which they had larger interests and greater concern, and was a manipulation of the business and affairs of Tower Hill to its detriment and loss and that of its stockholders, and for the monetary gain and aggrandizement of the individual Defendants and their associated and allied interests.

18. The extent of the operations and business of Tower Hill never justified the expenses for which it was charged

by said apportionments. A small office and a limited amount of sales, clerical and operating service were all that it required for every legitimate need of its business, and the expenses incident thereto ought to have cost only a small portion of the sums actually expended by this apportionment method. If the welfare of Tower Hill and its stockholders had been alone consulted, much less expense would have been incurred, but as it was, the business of Tower Hill was conducted as a department of the larger Hillman enterprises, for the purpose and with the result of casting upon Tower Hill an unjust proportion of the total cost and imposing upon it an excessive cost of carrying on its business.

19. No corporate action adopting, ratifying or approving said method of conducting the business of Tower Hill, as hereinbefore set forth, was ever taken, and the practice was established and pursued and the payments made at the instance and by the dominating influence of Hillman, who through the medium of intermediate stock ownership indirectly controlled the majority stock of Tower Hill, absolutely dictated its policy, management and business and was in effect the corporation itself; and Sheets, as Director and [fol. 12] Vice President or Treasurer, and Watson as Director and Secretary of Tower Hill, participated in said practice and payments and took no action to protect Tower Hill against said unlawful and fraudulent impositions.

20. Hillman, Sheets and Watson, as directors and officers of Tower Hill failed and neglected to discharge their duties in respect of said payments to protect the interests of Tower Hill, to regard and perform their duties as trustees for its minority stockholders, and to act with the good faith their duties, obligations and trusts required and demanded. In consequence whereof, Tower Hill lost large sums of money, the full amount of which can be determined only by a full and complete accounting, but which greatly exceeds the amount of the Hillman Company's said claim in the Primary Cause.

21. For the payment of such moneys as upon said accounting it may be decreed were improvidently, unlawfully and fraudulently paid out of the funds of Tower Hill, the individual Defendants and the Hillman Company are liable,

and demand for such accounting and repayment is hereby made.

22. Said practice of apportioning said expense pools began as regards Tower Hill about January 1, 1930, and continued to and including October, 1933, but prior thereto and from April, 1920, to and including December, 1929, there existed a like practice as regards Tower Hill of Pennsylvania. Said practice, as regards Tower Hill of Pennsylvania, was of the exact character and with the same injurious result and want of justification as herein averred in the case of Tower Hill, was without any corporate authorization or ratification, was with and for the same false and fraudulent intent and purpose as in the case of Tower Hill, and was in like manner actuated and dictated by Hillman and participated in by Sheets and Watson. The right to demand an accounting of and to recover said unlawful payments, as herein already stated, is now vested in the Receivers. The amount of such unlawful payments can be determined only by a full and complete accounting.

23. For the repayment of such moneys as upon said accounting it may be decreed were improvidently, unlawfully [fol. 13] and fraudulently paid out of the funds of Tower Hill of Pennsylvania, the individual Defendants and Hillman Company are liable to the Receivers, and demand for such accounting and repayment is hereby made.

24. From June, 1920, to August, 1929, a like practice of apportioning said expense pools prevailed as regards Eastern Coke. Said practice, as regards Eastern Coke, was of the exact character and with the same injurious result and want of justification as herein averred in the case of Tower Hill, was without any corporate authorization or ratification, was with and for the same false and fraudulent intent and purpose and was in like manner actuated and dictated by Hillman and participated in by Sheets and Watson. The right to demand an accounting of and to recover said unlawful payments, as herein already stated, is now vested in the Receivers. The amount of all such unlawful payments can be determined only by a full and complete accounting.

25. For the repayment of such moneys as upon said accounting it may be decreed were improvidently, unlawfully

and fraudulently paid out of the funds of Eastern Coke, the individual Defendants and Hillman Company are liable to the Receivers, and demand for such accounting and repayment is hereby made.

26. During the period from April, 1920, to October, 1933, the business of Tower Hill and of its subsidiaries, Tower Hill of Pennsylvania and Eastern Coke, all of whose properties and rights are now vested in the Receivers, was the mining of coal and the manufacture of coke from properties in Fayette County, Pennsylvania. All the coal produced and coke manufactured from said properties during said period, at the instance of Hillman and with the acquiescence and approval of Sheets and Watson, were taken and disposed of by the Hillman Company. Upon the appointment of the Receivers, they received from Hillman, Sheets and Watson certain books and records which were said by them to be all the books and records of Tower Hill and its subsidiaries. Said books do not disclose, and the Receivers are not advised of, the amounts of coal pro- [fol. 14] duced and coke manufactured from said properties during the several months and years of said period, or to whom, in what manner, for what price, and upon what terms and conditions they may have been sold or otherwise disposed of. From these records it would appear that certain amounts were monthly paid by the Hillman Company to Tower Hill and its subsidiaries, but said records wholly fail to show, and the Receivers are without information, whether said coal and coke were sold by Tower Hill and its subsidiaries to the Hillman Company and, if so, the amount of the tonnage and the amount and adequacy of the price, or whether such coal and coke were sold by the Hillman Company for the account of Tower Hill and its subsidiaries and, if so, what commission or compensation was received or deducted by the Hillman Company, or to whom and upon what contracts such coal and coke were delivered.

The Receivers are informed, but are without complete knowledge, that said coal and coke were apportioned upon and among contracts taken by the Hillman Company, but they are wholly without knowledge of the facts necessary to determine the propriety and fairness of such allocation and apportionment. The Receivers are advised and believe, and therefore charge, that it cannot be determined

whether the Hillman Company has fully and properly accounted for all such coal produced and coke manufactured from said properties during said period unless a full and complete accounting be judicially had and taken of all such coal and coke and the disposition thereof, and the Receivers are advised that as, during the whole of said period, a majority of the Board of Directors of the Hillman Company and of Tower Hill and its subsidiaries was composed of the same persons, and as all said companies were under the direction and domination of Hillman, they are entitled as a matter of right to such accounting.

27. The Receivers are advised and believe, and therefore aver, that Hillman, Sheets and Watson, as officers and directors of Tower Hill and its subsidiaries, failed and neglected to conduct the business of said corporations and to manage their affairs as independent going concerns, and in violation of their duties as directors and trustees for said corporations and their minority stockholders, caused [fol. 15] and permitted Tower Hill and its subsidiaries to be operated as mere departments of the Hillman Company, in consequence of which wrong doing, negligence and failure, Tower Hill and its subsidiaries lost large sums of money, for the payment of which, upon a proper accounting, the individual Defendants and the Hillman Company are liable. For such accounting and payment demand is hereby made.

28. In August, 1929, Hecla sold and conveyed to Redstone Coal and Coke Company (hereinafter called "Redstone"), a certain tract of coal land situate in Fayette County, Pennsylvania, consisting of about 2,000 acres and known as its Isabella Plant, at $2,000 per acre for the said tract of coal and an additional price, fixed by appraisement, for the developments, improvements and equipment on said tract.

29. As a condition of said purchase, Redstone insisted upon a certain minimum acreage, which was in excess of that owned by Hecla, and as a further condition, required that it be relieved of its coal mine and coke plant known as Thompson-Connellsville No. 1, in which there were 178.4 acres of unmined coal consisting of ribs, stumps and pillars, incapable of being profitably mined and of little, if any, value.

30. In order to meet the said conditions and effect said sale by Hecla, and for its benefit, 48 acres of the coal of Tower Hill of Pennsylvania were conveyed to Redstone at a price of $2000 per acre, and an additional 178.4 acres of its coal were conveyed to Redstone in exchange for which the said Thompson-Connellsville No. 1 plant was conveyed by Redstone to Tower Hill of Pennsylvania. The 178.4 acres of Tower Hill of Pennsylvania's coal so conveyed was of a value of at least $2,000 per acre.

31. Said sale and exchange stripped Tower Hill of Pennsylvania of its most desirable coal, and the result was that its remaining coal acreage was incapable of profitable operation and there was foisted upon it a practically worthless property.

32. The said exchange was caused to be made by Hillman through his domination and control of the business and [fol. 16] affairs of Tower Hill of Pennsylvania, and the purpose of it was to benefit him and Hecla at the loss and expense of Tower Hill of Pennsylvania. The majority of the directors of Hecla and Tower Hill of Pennsylvania were the same persons, and Hecla, through its control of Fayette Investment Company and thereby of Thompson-Connellsville Coke Company, was the owner of the majority of the capital stock of Tower Hill, which in turn owned all the stock of Tower Hill of Pennsylvania. The transaction was to the great advantage and profit of Hillman and Hecla and Hillman's allied interests and to the great disadvantage and loss of Tower Hill of Pennsylvania and Tower Hill. If Tower Hill of Pennsylvania had been independently represented, it would not have exchanged said 178.4 acres of its coal for said plant, Thompson-Connellsville No. 1, but would have demanded and required that payment for said 178.4 acres be made in cash. Thus Hecla, in order to effectuate its said sale, would itself have had to take over said Thompson-Connellsville No. 1 plant instead of foisting that property upon Tower Hill of Pennsylvania. As it was, Hillman, through his domination and control of Tower Hill of Pennsylvania, willfully, wantonly and fraudulently sacrificed its properties and rights to enrich Hecla, in which he had larger interest and greater concern. The benefits, advantages and profits of the transaction were accepted and enjoyed by Hecla.

33. Sheets and Watson had full knowledge of all the facts alleged in paragraphs 28 to 32 hereof, both inclusive, and made no objection to or protest against the said exchange but as officers and directors of Tower Hill of Pennsylvania, Tower Hill and Hecla, participated in the measures by which the said exchange was effected.

34. Tower Hill of Pennsylvania sustained further and additional serious losses in that since said transaction, Thompson-Connellsville No. 1 has been incapable of separate operation, the limited amount of coal mined therefrom has been through the Thompson-Connellsville No. 2 mine owned by Thompson-Connellsville Coke Company, and the large sums of money which have been expended in taxes, maintenance and improvements have greatly exceeded the gross receipts. Said expenditures were, under the circum- [fol. 17] stances, grossly improvident, have resulted in no value to Tower Hill of Pennsylvania or Tower Hill and were brought about by the fraud of Hecla and the individual Defendants in imposing Thompson-Connellsville No. 1 upon Tower Hill of Pennsylvania.

35. Receivers are advised and therefore charge that as against Tower Hill of Pennsylvania, with whose rights the Receivers are now vested, as herein already stated, said exchange was and is fraudulent and should be undone and Tower Hill of Pennsylvania, or Tower Hill, placed in the same situation that it would have been in if it had received the value of its said 178.4 acres of coal in cash instead of by a conveyance to it of said Thompson-Connellsville No. 1 plant; that the fair and rightful consideration for the 178.4 acres of coal so conveyed to Redstone in said exchange was not less than $2,000 per acre in cash; that in forcing Tower Hill of Pennsylvania to accept in lieu thereof the Thompson-Connellsville No. 1 plant, Hecla and the individual Defendants committed a fraud upon Tower Hill of Pennsylvania and on account thereof the Receivers are entitled to receive from Hecla and the individual Defendants the sum of $356,800 with interest thereon from August 31, 1929; that the Receivers are also entitled to have a full and complete accounting of all moneys received on account of coal mined from the Thompson-Connellsville No. 1 property and from the disposition of any other part of said property and of all moneys ex-ended on account of said property by way of taxes, maintenance, improvements or

otherwise, since August 31, 1929, and that the Receivers are entitled to receive all such moneys as upon such accounting it may be decreed should be paid to the Receivers by Hecla and the individual Defendants; and that upon the payment of all such sums of money, it will be the duty of Tower Hill and the Receivers to convey the Thompson-Connellsville No. 1 property to Hecla or to whomsoever may be lawfully entitled thereto. Tower Hill and the Receivers are ready and willing to make such conveyance upon such payment. For such accounting and payments demand is hereby made.

Wherefore, the Receivers, showing that said claims so asserted by Defendants before said Special Master in the Primary Cause cannot be adjudicated independently of a [fol. 18] consideration of the claims herein asserted by the Receivers against the Defendants and the adjudication of all said claims of the Defendants and said claims of the Receivers against the Defendants in one proceeding is necessary for the effectual enforcement of the decree in the Primary Cause, pray:

1. That there may be adjudicated in this ancillary proceeding the respective rights, obligations, and liabilities of the Receivers and the Defendants, and each of them, respecting any and all matters to which reference is made in this Ancillary Bill, including the claims of the respective Defendants referred to in paragraph 3 hereof, and that payments of moneys may be decreed to be made in accordance with such adjudication.

2. That the Defendants Hillman, Sheets and Watson, and each of them, may be required fully and accurately to account for all moneys received by them during the period May, 1920 to October, 1933, under the guise of salaries as officers of Tower Hill and/or Tower Hill of Pennsylvania and/or Eastern Coke, and that said Defendants, and each of them, be decreed to repay to the Receivers all the said moneys; and that said Defendants, and each of them, be decreed to pay to the Receivers the further sum of $1,184,000.00, with interest thereon from August 3, 1930, upon the surrender by the Receivers of the above mentioned 11,840 shares of the capital stock of Emerald Coal & Coke Company.

3. That the Defendants Hillman, Sheets and Watson and the Defendant Hillman Company, and each of them, may be required fully and accurately to account for all moneys received or retained by Hillman Company from Tower Hill and/or Tower Hill of Pennsylvania and/or Eastern Coke on account of the pool arrangements by which Hillman Company attempted to apportion and allocate certain office, operating, sales, overhead, and engineering expenses between and among various corporations with which it was directly or indirectly connected or affiliated, including Tower Hill and its subsidiaries Tower Hill of Pennsylvania and Eastern Coke, and also for all coal produced and coke manufactured from the properties of Tower Hill and its subsidiaries, Tower Hill of Pennsylvania and Eastern Coke, [fol. 19] during the period April, 1920, to October, 1933, and the proceeds of sale or other disposition thereof; and that said Defendants, Hillman, Sheets, Watson and Hillman Company, and each of them, be decreed to pay to the Receivers all such moneys as upon such accounting may be adjudicated to be due and owing to Tower Hill or the Receivers.

4. That the Defendants Hillman, Sheets and Watson and the Defendant Hecla, and each of them, be decreed to pay to the Receivers the sum of $356,800.00, with interest thereon from August 31, 1929, being the value in cash of the 178.4 acres of coal conveyed by Tower Hill of Pennsylvania to Redstone Coal & Coke Company in exchange for said Thompson-Connellsville No. 1 property, upon the conveyance by the Receivers of said Thompson-Connellsville No. 1 property to such person or persons as the Court may direct; and that said Defendants, and each of them, may be required fully and accurately to account for and repay to the Receivers all moneys of Tower Hill and/or Tower Hill of Pennsylvania expended for taxes upon and operation and maintenance of said Thompson-Connellsville No. 1 property and/or the electrification thereof, improvements thereon, and machinery and equipment therefor, less, however, such moneys as have been heretofore received by Tower Hill and/or Tower Hill of Pennsylvania for coal produced and coke manufactured and sold from said Thompson-Connellsville No. 1 property.

5. For such other, further, and additional relief as, upon such accountings and further proceedings in this Ancillary Cause or in said Primary Cause, it may be made to appear that justice and equity require.

George S. Baton, A. S. Alexander, H. D. Rummel, Receivers of Tower Hill Connellsville Coke Company of West Virginia. Edwin W. Smith, Arthur S. Dayton, E. C. Higbee, Wm. M. Robinson, Solicitors for Complainants.

[fol. 20] *Duly sworn to by A. S. Alexander et al. Jurats omitted in printing.*

[fol. 21] IN UNITED STATES DISTRICT COURT

In Equity. No. 3370

[Title omitted]

ORDER FILING AFFIDAVIT, ETC.—Feb. 19, 1934

This day came A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, by counsel and tendered and asked leave to file the affidavit of Ira H. Mottesheard, Clerk of this Court, that at the request and on behalf of the said Receivers the said Mottesheard had personally, on [fol. 22] the 19th day of February, 1934, deposited in the United States mail, at Charleston, West Virginia, a true and correct copy of the bill of complaint in this ancillary cause, and copy of order entered on the 19th day of February, 1934, in the chancery cause pending in this Court, No. 1434 in Equity, or Piedmont Coal Company et als. vs. Tower Hill Connellsville Coke Company of West Virginia, both certified by the Clerk of this Court, inserted in envelopes addressed to the following respective parties: J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, each at First National Bank Building, Pittsburgh, Pennsylvania, and each such envelope properly stamped and registered, and that the said affiant had personally on the 19th day of February, 1934, delivered a copy of said order and said bill, likewise certified by the Clerk of this Court,

at the office of E. W. Knight, Esq., in Charleston, West Virginia, which affidavit begin seen and inspected by the Court is now here ordered filed.

IN UNITED STATES DISTRICT COURT

In Equity. No. 3370

[Title omitted]

AFFIDAVIT OF IRA H. MOTTESHEARD, CLERK—Filed February 19, 1934.

STATE OF WEST VIRGINIA,
County of Kanawha, ss:

This day personally appeared before me, a Notary Public in and for the county and state aforesaid, Ira H. Mottesheard, who being by me first duly sworn, deposes and says [fol. 23] that he is Clerk of the District Court of the United States for the Southern District of West Virginia, in which said Court an ancillary bill of complaint in the above entitled cause was filed by order entered by said Court on the 19th day of February, 1934, in the chancery cause of Piedmont Coal Company et al., plaintiffs, vs. Tower Hill Connellsville Coke Company of West Virginia, Defendant, No. 1434 in Equity. Affiant further says that at the request and upon behalf of A. S. Alexander, H. D. Rummel and George S. Baton, Receivers, plaintiffs in the above entitled cause, and in accordance with said order, this affiant personally, on the 19th day of February, 1934, deposited in the United States mail, at Charleston, West Virginia, a true and correct copy of said order and of said ancillary bill of complaint of A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, vs. J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, certified by this affiant as Clerk of said Court as aforesaid, inserted in envelopes addressed to the following respective parties: J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, each at First National Bank Building, Pittsburgh, Pennsylvania, and affiant further says

that each such envelope was properly stamped and registered. Affiant further says that on the 19th day of February, 1934, this affiant personally delivered a copy of said order and said ancillary bill, each likewise certified by this affiant as Clerk of said Court as aforesaid, at the office of E. W. Knight, Esq., in Charleston, West Virginia.

Ira H. Mottesheard.

Taken, subscribed and sworn to before me this 19th day of February, 1934.

Carrie Davis, Notary Public in and for the County and State aforesaid. (Notarial Seal.)

My commission expires July 6, 1942.

[fol. 24] IN UNITED STATES DISTRICT COURT

In Equity. No. 3370

[Title omitted]

MOTION TO QUASH SERVICE AND TO DISMISS BILL FOR WANT OF JURISDICTION—Filed March 19, 1934

To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation, defendants herein, each by his or its attorney, appears herein specially for the sole purpose of making this motion to question the jurisdiction of the Court in this proceeding and for said purpose only moves the Court to quash the service of a copy of the order entered by this court in the case of Piedmont Coal Company and others against Tower Hill Connellsville Coke Company of West Virginia, No. 1434 in equity, and a copy of the Bill of Complaint filed at the above Number in Equity and therein designated as "Ancillary Bill of Complaint" and to dismiss said Bill for want of jurisdiction on the following grounds:

[fol. 25] (1) No legal service of process has been made on any of the defendants in this proceeding and this Court has no jurisdiction in rem or in personam of any of the defendants to said Bill.

(2) It does not appear of record that any of the defendants are citizens or inhabitants of, or residents in, or were to be found within, the Southern District of West Virginia at the time of the filing of the said Bill of Complaint.

(3) Each of the individual defendants at the time of the filing of the said Bill of Complaint and of the mailing of a copy of the said Bill to him and for many years prior thereto was a citizen and inhabitant of the Commonwealth of Pennsylvania and a resident of the City of Pittsburgh, Allegheny County, in said Commonwealth, and was not to be found either within the Southern District of West Virginia or within the State of West Virginia; and at no time since the filing of the said Bill have any of the said defendants been a citizen, inhabitant or resident of, to be found within, the said Southern District of West Virginia, or State of West Virginia.

(4) Hillman Coal and Coke Company and Hecla Coal and Coke Company is each a corporation incorporated under the laws of the Commonwealth of Pennsylvania, having its domicile in the City of Pittsburgh, County of Allegheny in said Commonwealth, and neither of said corporations owns or possesses any property within the Southern District of West Virginia, or is registered to do business within said State of West Virginia or has an agent therein for the service of process upon it, or does any business therein.

E. W. Knight, Brown, Jackson & Knight, Alter, Wright & Barron, Attorneys for the aforesaid defendants appearing specially for the sole purpose aforesaid.

[fol. 26] IN UNITED STATES DISTRICT COURT

In Equity. No. 3370

A. S. ALEXANDER, H. D. RUMMEL AND GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and Hecla Coal and Coke Company, a Corporation

DECREE—July 30, 1934

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

(1) That the memorandum decision of this Court, marked "Memorandum Decision" and prepared by the Court after submission of this cause, be and the same is hereby amended by including therein the following pursuant to the stipulation of Counsel for Plaintiffs and Defendants made on the argument of the said cause, to wit, that on or before February 19, 1934, neither the said J. H. Hillman, Jr., A. B. Sheets nor Thomas Watson was an inhabitant of the Southern District of West Virginia, but each of said individual defendants on or before said date was, ever since has been and now is a citizen of the Commonwealth of Pennsylvania, a resident of the City of Pittsburgh in said Commonwealth and an inhabitant of the Western District of Pennsylvania; and that on or before said date neither Hillman Coal and Coke Company nor Hecla Coal and Coke Company was an inhabitant of the Southern District of West Virginia, but each of said corporate defendants on or before said date was, ever since has been and now is a corporation created, organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office or place of business in said City of Pittsburgh and a citizen and resident of said Commonwealth and an inhabitant of the Western District of Pennsylvania and that neither of said corporations on or after said date had or has had a place of business in or transacted any business within the State of West Virginia.

[fol. 27] (2) That the said Memorandum Decision as amended be and hereby is filed and made part of the record in this cause.

(3) That for the reasons stated in said Memorandum Decision as amended, Defendants' motion entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction", filed March 19, 1934, be, and hereby it is sustained and the Bill of Complaint entitled "Ancillary Bill of Complaint" filed February 19, 1934, in this cause and referred to in said Motion be and hereby it is dismissed for want of jurisdiction over the persons of the Defendants, but this decree is without prejudice to A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, to assert the matters of fact and to seek the remedies set out in said Bill of Complaint in any court having jurisdiction.

(4) That Defendants shall recover their costs accrued upon said Bill of Complaint and said Motion.

Thereupon Plaintiffs, by counsel, excepted to the judgment and decree of the Court, which exception is allowed and at their instance a bill is sealed.

IN UNITED STATES DISTRICT COURT

In Equity. No. 3370

A. S. ALEXANDER, H. D. RUMMELL AND GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a corporation, and Hecla Coal and Coke Company, a corporation.

MEMORANDUM DECISION—Filed July 30, 1934

[fol. 28] McCLINTIC, District Judge:

On the 19th day of February, 1934, the plaintiffs filed their ancillary bill of complaint in this cause against the defendants above named. It will be useless, so far as this

memorandum is concerned, to give the history of the case, as that can easily be found in the decisions heretofore rendered by this court and by the Circuit Court of Appeals.

This bill is for the purpose of collecting large sums of money, from the defendants, alleged to be due to the receivers herein, and this bill is a consequence of the decisions of the courts in this case heretofore made.

The question before me is, has this court jurisdiction of this suit, and jurisdiction over these defendants, under the circumstances as they now stand herein?

The claim of the plaintiffs is that by reason of the appearance of these defendants in this suit before the Master to whom this suit had been referred, and by reason of the claims of these defendants filed before the Master, claiming certain sums of money in each case to be due each one thereof, each one of them became a party to this suit for all purposes, and that by reason thereof, the receivers had a right to file this ancillary bill in this suit to recover the sums of money claimed.

For the purpose of information, this court entered an order on the 19th day of February, 1934, requiring the defendants to appear by a certain date and make any motions they might desire, and directing that a true copy of the order and of the bill be delivered to the defendants.

This order, and the things to be done thereunder, were then or now in no way intended to be a service of process upon these defendants. The whole theory of the plaintiffs was and is that these defendants were already parties to this suit, and did not require any service of process upon them, other than to give them notice of the filing of the bill.

By motions filed on the 19th day of March, 1934, the defendants first moved to quash what they called "service" upon the defendants, and to dismiss the bill for want of jurisdiction; also moved to vacate the order of court entered on the 19th day of February, 1934, and to quash the service of said order and of the bill of complaint mentioned therein.

[fol. 29] As stated above, there was no pretense that such order was a service of process.

The sole question here is, has this court, under the circumstances herein set out, jurisdiction of the defendants? This question has been fully argued, and briefs have been filed by each side. Under the decisions of the Supreme

Court of West Virginia, I am inclined to hold that they are parties for all purposes. However, I find but little, if any, supporting authority from federal courts for that holding.

I appreciate the fact that if I were to so hold, then the suit would have to proceed to a final conclusion before the question of jurisdiction could be finally decided. Great cost and expense would be incurred. It is to be regretted that a Federal District Judge has no way of certifying a question of this character to the Circuit Court of Appeals.

I think it right, in this case, however, to enter an order sustaining the motion of the defendants, so that the plaintiffs can appeal therefrom and we can be favored with a final decision on the question whether this court has or has not jurisdiction, as claimed by the plaintiffs, and which is denied by the defendants. This is, in one sense, an administrative act, but it will be the final order of this court on this question unless reversed by the court of superior jurisdiction.

Therefore, it will be the order of this court that the motions of the defendants, and each of them, be sustained.

IN UNITED STATES DISTRICT COURT

In Equity. No. 3370

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed July 30, 1934

[fol. 30] And the said A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, assign the following errors in the record and proceedings in said cause:

(1) The District Court of the United States for the Southern District of West Virginia erred in entering its decree of July 30, 1934.

(2) Said Court erred in sustaining the motion of Defendants filed March 19, 1934, and marked "Motion to

Quash Service and to Dismiss Bill for Want of Jurisdiction".

(3) Said Court erred in not overruling said motion.

(4) Said Court erred in dismissing the Ancillary Bill of Complaint for want of jurisdiction.

(5) Said Court erred in entering its decree of July 30, 1934, at No. 1434 in Equity (known as the "Primary Cause"), sustaining the motion filed therein March 19, 1934, and vacating the order entered therein February 19, 1934.

(6) Said Court erred in refusing to adjudge and decree that it had jurisdiction of this ancillary cause and of the persons of Defendants, and in failing and refusing further to consider this cause and upon such consideration to grant relief as prayed for in said Ancillary Bill of Complaint.

For which errors, said A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers, pray that said decree of the United States District Court for the Southern District of West Virginia, entered July 30, 1934, in the above-entitled cause, be reversed and the cause remanded with directions to overrule said motion and to reinstate said Ancillary Bill of Complaint, and for such other and further relief as may be proper in the premises.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton.

[fol. 31] IN UNITED STATES DISTRICT COURT

In Equity

No. 3370

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed July 30, 1934

To Ira H. Mottesheard, Esq., Clerk:

Prepare and certify a transcript of the record for transmission to the Circuit Court of Appeals for the Fourth Circuit, in pursuance of the appeal heretofore taken, and in-

clude therein the following documents, some of which are filed at No. 1434 in Equity (hereinafter referred to as the "Primary Cause"), and the others at No. 3370 in Equity (hereinafter referred to as the "Ancillary Cause"):

(1) Order entered in the Primary Cause December 12, 1933, appointing J. E. Campbell Special Master.

(2) Statement in narrative form, pursuant to Equity Rule 75, of the evidence in the Primary Cause as approved by the Court or the Judge.

(3) Proof of claim of Hecla Coal and Coke Company filed January 30, 1934, in the Primary Cause marked "Proof of Claim of Hecla Coal and Coke Company as the Owner of Shares of the Preferred Stock and the Common Stock of the Tower Hill Connellsville Coke Company of West Virginia".

(4) Proof of claim of Thomas Watson filed January 30, 1934, in the Primary Cause, marked "Proof of Claim of Thomas Watson".

[fol. 32] (5) Proof of claim of Hillman Coal and Coke Company filed January 30, 1934, in the Primary Cause marked "Proof of Claim of Hillman Coal and Coke Company".

(6) Proof of claim of J. H. Hillman, Jr., and A. B. Sheets filed January 30, 1934, in the Primary Cause marked "Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets, as Sureties upon the Supersedeas Bond of Tower Hill Connellsville Coke Company".

(7) Order entered February 19, 1934, in the Primary Cause.

(8) Ancillary Bill of Complaint filed February 19, 1934, in the Ancillary Cause.

(9) Affidavit of Ira H. Mottesheard filed February 19, 1934, in the Ancillary Cause.

(10) Order entered February 19, 1934, in the Ancillary Cause, filing said affidavit.

(11) Motion filed March 19, 1934, in the Primary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of said Order and of the Bill of Complaint Therein Mentioned".

(12) Motion filed March 19, 1934, in the Ancillary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hill-

man Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction".

(13) Opinion of the Court marked "Memorandum Decision" filed in both Causes, sustaining said motions.

(14) Decree entered July 30, 1934, in the Primary Cause.

(15) Decree entered July 30, 1934, in the Ancillary Cause.

[fol. 33] (16) Assignment of errors and prayer for reversal filed in the Primary Cause.

(17) Assignment of errors and prayer for reversal filed in the Ancillary Cause.

(18) This præcipe and such orders or directions as the Court or the Judge may enter or give relating to the transcript of the record pursuant to Equity Rule 75.

(19) Memorandum in accordance with Section 7 of Rule 14 of the Circuit Court of Appeals for the Fourth Circuit.

(20) Clerk's Certificate.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton, Attorneys for A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, Appellants.

Dated July 30, 1934.

IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity

No. 3370

NOTICE AS TO PRÆCIPE—Filed July 30, 1934

[fol. 34] To Edward W. Knight, Esq., and Alexander J. Barron, Esq., Attorneys for J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appellees:

You are hereby notified that on the 30th day of July, 1934, the Appellants, A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke

Company of West Virginia, filed with the Clerk of the District Court of the United States for the Southern District of West Virginia their præcipe indicating the portions of the record to be incorporated in the transcript of the record on their appeal in the above entitled cause, a copy whereof being attached hereto.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton, Attorneys for Appellants.

July 30, 1934.

July 30, 1934, service of the above notice is hereby accepted and receipt of a copy thereof and of the præcipe therein mentioned is hereby acknowledged.

E. W. Knight, Attorneys for Appellees. Appearing specially for the sole purpose hereinbefore set forth in this cause and for no other purpose.

[fol. 35] IN UNITED STATES DISTRICT COURT

In Equity

No. 3370

[Title omitted]

ORDER AS TO RECORD—Aug. 6, 1934

This cause came on to be further heard at this term, and thereupon came A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, appellants in the appeal heretofore allowed in this cause, by E. C. Higbee and Arthur S. Dayton, their attorneys; and thereupon came J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation, appellees in the foregoing appeal, by Edward W. Knight and Alexander J. Barron, their attorneys, appearing especially for the sole purposes hereinbefore set forth in this cause; and thereupon the said appellees tendered their objections in writing to appellants' direction as contained in their præcipe for transcript of record, and the same are hereby ordered filed. And thereupon appellees waived provisions of Equity Rule 75 as to proof

or acknowledgment of service of a copy of the præcipe f
the record in this cause, and waived provisions that t
said præcipe should be lodged ten days in the Clerk's offic
and waived all requirements as to notice and lodging in t
Clerk's office of appellants' statement of essential parts
the evidence hereinafter referred to, and waived all r
quirements as to notice of this hearing, and it was agre
by the parties that all matters relating to the settlement a
determination of the record upon the appeal heretofo
awarded in this cause should be submitted to the Court
this time and place. And the Court having maturely co
sidered appellees' objections to appellants' directions
contained in their præcipe for transcript of record is
opinion to and doth overrule the same, and it is according
[fol. 36] adjudged, ordered and decreed that the reco
upon the appeal allowed in this cause on the 30th day
July, 1934, shall be in accordance with appellees' præci
for transcript of record filed in this cause on the 30th day
July, 1934, and the Court doth decree, and doth hereby d
rect, that the record in this cause, being No. 3370 in equit
hereinafter referred to as the "ancillary cause", (the cau
No. 1434 in equity being hereinafter referred to as "p
mary cause") shall consist of the following, that is to sa

(1) Order entered in the Primary Cause December 1
1933, appointing J. E. Campbell Special Master.

(2) Statement in narrative form, pursuant to Equi
Rule 75, of the evidence in the Primary Cause as approv
by the Court by decree this day entered in the Prima
Cause.

(3) Proof of claim of Hecla Coal and Coke Compa
filed January 30, 1934, in the Primary Cause mark
"Proof of Claim of Hecla Coal and Coke Company as t
Owner of Shares of the Preferred Stock and the Comm
Stock of the Tower Hill Connellsville Coke Company
West Virginia".

(4) Proof of claim of Thomas Watson filed January 3
1934, in the Primary Cause, marked "Proof of Claim
Thomas Watson".

(5) Proof of claim of Hillman Coal and Coke Compa
filed January 30, 1934, in the Primary Cause mark
"Proof of Claim of Hillman Coal and Coke Company".

(6) Proof of claim of J. H. Hillman, Jr., and A. B. Sheets filed January 30, 1934, in the Primary Cause marked "Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets, as Sureties upon the Supersedeas Bond of Tower Hill Connellsville Coke Company."

(7) Order entered February 19, 1934, in the Primary Cause.

(8) Ancillary Bill of Complaint filed February 19, 1934, in the Ancillary Cause.

[fol. 37] (9) Affidavit of Ira H. Mottesheard filed February 19, 1934, in the Ancillary Cause.

(10) Order entered February 19, 1934, in the Ancillary Cause, filing said affidavit.

(11) Motion filed March 19, 1934, in the Primary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, and Hecla Coal and Coke Company, entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of said Order and of the Bill of Complaint Therein Mentioned".

(12) Motion filed March 19, 1934, in the Ancillary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, and Hecla Coal and Coke Company, entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction".

(13) Opinion of the Court marked "Memorandum Decision" filed in both Causes, sustaining said motions.

(14) Decree entered July 30, 1934, in the Primary Cause.

(15) Decree entered July 30, 1934, in the Ancillary Cause,

(16) Assignment of errors and prayer for reversal filed in the Primary Cause.

(17) Assignment of errors and prayer for reversal filed in the Ancillary Cause.

(18) The said præcipe for the record hereinbefore referred to, this order and decree, and said objections of appellees.

(19) Memorandum in accordance with Section 7 of Rule 14 of the Circuit Court of Appeals for the Fourth Circuit.

(20) Clerk's Certificate.

All of which is ordered and decreed accordingly.

[fol. 38] IN UNITED STATES DISTRICT COURT

In Equity. No. 3370

[Title omitted]

APPELLEES' OBJECTIONS TO APPELLANTS' DIRECTIONS AS CONTAINED IN THEIR PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 6, 1934

To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

And now come J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appellees, by Edward W. Knight, Esq., and Alexander J. Barron, Esq., their solicitors, appearing specially for the sole purpose hereinbefore set forth in this cause and file the following objections to Appellants' Præcipe for the Transcript of the Record and the Directions therein contained as to the general contents thereof, viz.:

One. Appellees object to the inclusion in said Transcript of the Record of the Order of Court designated in Paragraph Number (1) of Appellants' Præcipe as "Order entered in the Primary Cause December 12, 1933, appointing J. E. Campbell Special Master".

For the reason that the said Order of Court is not filed in and is not a part of the record in this cause.

[fol. 39] Two. Appellees object to the inclusion in said Transcript of the Record of the document designated in Paragraph Number (2) of Appellants' Præcipe as "Statement in narrative form, pursuant to Equity Rule 75, of the evidence in the Primary Cause as approved by the Court or the Judge."

For the reason that the said Statement of Evidence is a narrative of certain testimony taken before J. E. Campbell, Special Master, pursuant to a Decree of Reference entered December 12, 1933, in the Chancery cause of Piedmont Coal Company, et al. vs. Tower Hill Connellsville Coke Company of West Virginia, at No. 1434 in Equity of this Court and is not a part of the record in this cause; and for the further reason that the said testimony has been taken in certain hearings before the Special Master which have not yet been concluded by him and is therefore incomplete and said testimony has not yet been returned by the said Special Master to this Court and no report has been made thereon or filed of record.

Three. Appellees object to the inclusion in said Transcript of the Record of the documents designated in Paragraphs Numbered (3), (4), (5) and (6) of Appellants' Præcipe.

For the reason that the said Proofs of Claim are not filed in and made a part of the record in this cause, but are Proofs of Claim which have been presented to the said J. E. Campbell, Special Master, pursuant to the said Decree of Reference entered in the Chancery cause of Piedmont Coal Company, et al. vs. Tower Hill Connellsville Coke Company of West Virginia, at No. 1434 in Equity; and for the further reason that no disposition has yet been made of said claims by said Special Master and no report thereon has been made or filed of record in said cause.

Four: Appellees object to the inclusion in said Transcript of the Record of the document designated in Paragraph Numbered (11) of Appellants' Præcipe as "Motion filed March 19, 1934, in the Primary Cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled 'Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of said Order and of the Bill of [fol. 40] Complaint Therein Mentioned' ".

For the reason that the said Motion is not filed in and is not a part of the record in this cause.

Five. Appellees object to the inclusion in said Transcript of the Record of the Decree designated in Paragraph Num-

bered (14) of Appellants' Præcipe as "Decree entered July 30, 1934, in the Primary Cause".

For the reason that the said Decree is not filed in and is not a part of the record in this cause.

Six. Appellees object to the inclusion in said Transcript of the Record of the Instrument designated in Paragraph (16) of the Appellants' Præcipe as "Assignment of errors and prayer for reversal filed in the Primary Cause".

For the reason that the said Instrument is not filed in and is not a part of the record in this cause.

Appellees further submit that the Transcript of the Record in this cause should consist of the following documents only:

(1) Bill of Complaint filed February 19, 1934, in this cause.

(2) Order entered February 19, 1934, in No. 1434 on the Equity Docket of this Court.

(3) Affidavit of Ira H. Mottesheard filed February 19, 1934, in this cause.

(4) Order entered February 19, 1934, in this cause filing said Affidavit.

(5) Motion filed March 19, 1934, in this cause by J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction".

(6) Opinion of the Court marked "Memorandum Decision", sustaining said Motion filed in this cause.

(7) Decree entered July 30, 1934, in this cause.

(8) Assignment of Errors and prayers for reversal filed in this cause.

(9) Appellants' Præcipe for Transcript of Record; Appellees' Objections thereto, as herein set forth, and such [fol. 41] Orders and Directions as the Court or the Judge may enter or give relating to the Transcript of Record pursuant to Equity Rule 7'.

(10) Memorandum in accordance with Section 7 of Rule 14 of the Circuit Court of Appeals for the Fourth Circuit.

(11) Clerk's Certificate.

Edward W. Knight, Alexander J. Barron, Solicitors for Appellees, J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appearing Specially for the Sole Purpose Hereinbefore Set Forth, etc.

IN UNITED STATES DISTRICT COURT

In Equity

No. 1434

PIEDMONT COAL COMPANY, a Corporation Created and Existing under the Laws of the Commonwealth of Pennsylvania, and G. S. Harah, Edgar S. Hackney and J. E. Hess, the Three Individuals Residing in the City of Uniontown, County of Fayette, and Commonwealth of Pennsylvania, and All the Plaintiffs Being Citizens of Said Commonwealth and Domiciled in the Western District Thereof

vs.

TOWER HILL CONNELLSVILLE COKE COMPANY OF WEST VIRGINIA, a Citizen of the State of West Virginia, Domiciled in the Southern District Thereof

STATEMENT OF ESSENTIAL PARTS OF EVIDENCE AND PROCEEDINGS AT A HEARING HELD AT CHARLESTON, WEST VIRGINIA, BEFORE J. E. CAMPBELL, SPECIAL MASTER, ON JANUARY 30, 1934, PURSUANT TO DECREE OF REFERENCE ENTERED DECEMBER 12, 1933—Filed August 6, 1934

[fol. 42] Evidence of Thomas Watson: The witness lives at Pittsburgh, Pennsylvania, is an attorney-at-law and secretary of Thompson Connellsville Coke Company and the Hecla Coal and Coke Company, and is a director of each of them. The Hecla Coal and Coke Company is a common and preferred stockholder of Tower Hill Connellsville Coke

Company of West Virginia, owning 2,037 shares of the preferred stock of the latter company, evidenced by certificates of stock which the witness filed, and 2,451 shares of the common stock, evidenced by certificates of stock which the witness filed, all of said certificates being in the name of the Hecla Coal and Coke Company. The Hecla Coal and Coke Company is the sole owner of these shares which are not pledged. Proof of claim of Hecla Coal and Coke Company, marked "Proof of Claim of Hecla Coal and Coke Company as the Owner of Shares of the Preferred Stock and the Common Stock of the Tower Hill Connellsville Coke Company of West Virginia", was filed in connection with the witness's testimony.

Examination of Witness John T. Wilson by Thomas Watson: Mr. Wilson was asked by Mr. Watson if he had examined the books of the Tower Hill Connellsville Coke Company of West Virginia to see whether they showed any indebtedness due from that Company to J. H. Hillman, Jr., the witness answering in the affirmative and stating that the books showed that the Company owed J. H. Hillman, Jr., salary for the month of October, 1933, in the amount of $250.00. Mr. Watson asked the witness if he had examined the books of the Company to see what they showed in regard to any indebtedness due to Thomas Watson, the witness answering in the affirmative and stating that the books showed that there was due to Thomas Watson salary for the month of October, 1933, in the amount of $250.00. Mr. Watson tendered, and there was filed, the proof of claim of Thomas Watson, marked "Proof of Claim of Thomas Watson", for professional services rendered, showing a balance of $33,750.00. He also tendered, and there was filed, proof of claim of Hillman Coal and Coke Company, marked "Proof of Claim of Hillman Coal and Coke Company", for office expense and general overhead for the month of October, 1933, amounting to $2,720.03. He also tendered, and there was filed, proof of claim of J. H. Hillman, Jr., and A. B. [fol. 43] Sheets, as sureties upon the supersedeas bond filed on the appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the decree of the District Court of the United States for the Southern District of West Virginia, said proof of claim being marked "Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets as Sureties upon the Supersedeas Bond of Tower Hill Connellsville Coke Company".

IN UNITED STATES DISTRICT COURT

In Equity. No. 1434

[Title omitted]

NOTICE OF LODGMENT

To Edward W. Knight, Esq., and Alexander J. Barron, Esq., Attorneys for J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, Appellees:

You are hereby notified that the Appellants, A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, have prepared and lodged in the office of the Clerk of the District Court of the United States for the Southern District of West Virginia, a statement of the essential parts of the evidence and proceedings in the above-entitled cause, at a hearing held at Charleston, — Virginia, before J. E. Campbell, Special Master, on January 30, 1934, pursuant to a decree of reference entered December 12, 1933, for your examination and the examination of any other parties in interest. A copy of said statement is attached hereto.

You are further notified that we will ask the Court or [fol. 44] the Judge to approve said statement on August 13, 1934, at 2 o'clock, P. M., or as soon thereafter as the attention of the Court or the Judge can be had, at the farm of the Honorable George W. McClintic near Marlinton, West Virginia.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton, Attorneys for Appellants.

July 30, 1934.

July 30th, 1934, service of the foregoing notice is hereby accepted and receipt of a copy thereof and of the statement have at all times been apportioned to the individual

Edward W. Knight, Attorney for Appellees. Appearing specially for the sole purpose hereinbefore set forth in this cause and for no other purpose.

IN UNITED STATES DISTRICT COURT

In Equity. No. 1434

[Title omitted]

ORDER OF REFERENCE, ETC.—Dec. 12, 1933

[fol. 45] On this day this cause came on to be heard at this term upon notice heretofore given, and thereupon came the plaintiffs by their attorneys, and likewise came the defendant by its attorney, and the Receivers heretofore appointed herein by their attorney, and it appeared to the Court that this cause involves matters of accounts, and it having been shown that exceptional conditions herein within the meaning of Federal Equity Rule 59 require a reference, it is ordered, adjudged and decreed that this cause be, and the same is hereby referred to J. E. Campbell, Esq., of the City of Charleston, West Virginia, as Special Master (the said Campbell being suggested by counsel for plaintiffs and defendant as a proper person for such appointment, it being understood that this shall not be regarded as a consent decree by reason of such suggestion), to take, state and report an account and report to the Court showing—

(1) All the debts, obligations and claims against the said defendant, Tower Hill Connellsville Coke Company of West Virginia, the nature, amount and respective priorities thereof, together with any interest that may have accrued thereon, and whether or not any one or more of said debts are secured by liens upon property of the defendant or otherwise secured, and the validity and character of such security, and any property subject to such liens, and the persons, firms and corporations, with their addresses, who are respectively owners or holders of, or assert claims with respect to, said debts, obligations and claims;

(2) The owners of the preferred stock of said Tower Hill Connellsville Coke Company of West Virginia, together with their addresses so far as obtainable, the number of shares held by each of them, and the dividends accumulated and unpaid thereon;

(3) The owners of all the common stock of said Tower Hill Connellsville Coke Company of West Virginia, including their names and addresses so far as obtainable, and the number of such shares held respectively by them; and

(4) Such other matters as any party in interest may require, the same being pertinent, or such other matters as said Master himself may deem pertinent, whether so required or not.

[fol. 46] The said Special Master shall have power to compel the attendance of, and to administer oathes to, witnesses, and shall have all powers and authorities set forth in United States Equity Rule 62, and is hereby authorized to employ stenographic and clerical assistance.

Before proceeding the said Special Master shall give notice to all parties to this cause, and to all claimants, creditors, and all persons claiming to be creditors, and to all preferred stockholders and to all common stockholders of Tower Hill Connellsville Coke Company of West Virginia, a corporation, defendant herein, of the time and place of the hearing of the matters hereby referred to him, by publication once each week for four successive weeks (a period of at least twenty-eight days to elapse between the first publication thereof and the commencement of said hearing), in The Charleston Daily Mail, a newspaper of general circulation published in the City of Charleston, County of Kanawha, State of West Virginia, and in the Pittsburgh Post-Gazette, a newspaper of general circulation published in the City of Pittsburgh, County of Allegheny, State of Pennsylvania. In addition to said publication said Special Master shall give due notice of said hearing to each of the parties to this cause, or their solicitors, as required by Equity Rule 60, and to the Receivers of the defendant, Tower Hill Connellsville Coke Company of West Virginia, or to their solicitors. Said Special Master shall have the right, without further notice, to adjourn said hearing from time to time.

It is further ordered that when the said Special Master shall fix the time and place of hearing as aforesaid, the Receivers heretofore appointed in this cause shall mail a copy of the notice of such hearing to all the creditors and stockholders of the defendant, Tower Hill Connellsville Coke Company of West Virginia as the same appear from any

books of the defendant Corporation that may be in their hands, but the failure of the Receivers so to do shall not invalidate any proceeding of said Special Master and shall not invalidate or affect any hearing so long as notice by publication be given as hereinbefore directed.

The said Special Master shall report in writing to this Court, for its further action, his findings and conclusions, [fol. 47] in accordance with this decree, and shall accompany his report by all papers and documents filed before him, and by a transcript of all evidence taken and filed before him.

The Court doth reserve the right, pending said reference, to enter all proper orders and decrees in this cause.

It further appearing to the Court that there is pending in the United States District Court for the Western District of Pennsylvania, in an equity cause entitled A. S. Alexander, H. D. Rummel and George S. Baton, Receivers, versus Tower Hill Connellsville Coke Company of West Virginia, et al., being a proceeding of a nature ancillary to this cause, it is ordered that the Receivers heretofore appointed herein do tender to file a certified copy of this decree in said Court to the end that the Judges of said Court may be advised hereof.

IN UNITED STATES DISTRICT COURT

In Equity

No. 1434

[Title omitted]

PROOF OF CLAIM OF HECLA COAL & COKE COMPANY AS THE OWNER OF SHARES OF THE PREFERRED STOCK AND THE COMMON STOCK OF THE TOWER HILL CONNELLSVILLE COKE COMPANY OF WEST VIRGINIA

To J. E. Campbell, Special Master in Chancery in the above proceedings:

In compliance with the notice given by you under date of December 26, 1933, Hecla Coal & Coke Company, a corporation under the laws of the State of Pennsylvania, having its office and principal place of business in the First

National Bank Building, City of Pittsburgh, Allegheny County, Pennsylvania, files this its proof of claim with you, for the purpose of participating in any distribution or liquidating dividend paid by the Tower Hill Connellsville Coke Company of West Virginia or the Receivers thereof, to either its Preferred or its Common stockholders or to both. [fol. 48] The Tower Hill Connellsville Coke Company of West Virginia has issued the following certificates for shares of its Preferred stock to this claimant, Hecla Coal & Coke Company:

Date	Certificate No.	Shares
Apr. 3, 1924	A 522	25
Feb. 16, 1925	A 526	110
Dec. 31, 1928	A 528	380
Dec. 27, 1929	A 529	50
Aug. 13, 1930	A 530	240
Oct. 15, 1930	A 531	24
Nov. 26, 1930	A 532	33
Dec. 31, 1930	A 533	1,117
Dec. 31, 1931	A 534	48
Dec. 28, 1932	A 536	10
Total		2,037

The Tower Hill Connellsville Coke Company of West Virginia has issued the following certificates for shares of its Common stock to this claimant Hecla Coal & Coke Company:

Date	Certificate No.	Shares
Nov. 16, 1926	B 1118	1,641
Dec. 31, 1926	B 1119	15
Apr. 14, 1927	B 1123	13
July 14, 1927	B 1126	110
Oct. 13, 1927	B 1127	50
Dec. 31, 1927	B 1129	33
Apr. 13, 1928	B 1131	12
July 14, 1928	B 1132	34
Dec. 31, 1928	B 1136	6
Apr. 26, 1929	B 1138	13
Dec. 27, 1929	B 1140	33
Apr. 14, 1930	B 1142	19
July 15, 1930	B 1143	13
Aug. 13, 1930	B 1145	6

Date	Certificate No.	Shares
Oct. 15, 1930	B 1152	29
Nov. 26, 1930	B 1154	123
Dec. 31, 1930	B 1162	247
Dec. 31, 1931	B 1170	54
Total		2,451

[fol. 49] The originals of said stock certificates will be exhibited to you by the claimant, Hecla Coal & Coke Company, for inspection and examination by you at any time which you may designate.

Hecla Coal & Coke Company, by A. B. Sheets, Vice-President. (Corporate Seal.)

Attest:

Thos. Watson, Secretary.

Duly sworn to by A. B. Sheets. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

In Equity

No. 1434

[Title omitted]

PROOF OF CLAIM OF THOMAS WATSON

[fol. 50] To J. E. Campbell, Special Master in Chancery in the above proceedings:

In compliance with the notice given by you under date of December 26, 1933, Thomas Watson, an attorney at law, having his office in the First National Bank Building, in the City of Pittsburgh, Allegheny County, Pennsylvania, files with you his Proof of Claim against the Tower Hill Connellsville Coke Company of West Virginia in the sum of $33,750.00. The nature of this claim is as follows:

1. The claimant was employed as Secretary of the Tower Hill Connellsville Coke Company of West Virginia at a salary of $250.00 per month. Claimant discharged all of his

duties as Secretary of said corporation from October 1, 1933, until on or about October 26, 1933, at which time the assets of the corporation were turned over to its receivers, and the management of the corporation's affairs was taken out of the hands of its executive officers.

2. On or about November 3, 1924, the plaintiffs herein filed their bill in equity against Tower Hill Connellsville Coke Company of West Virginia as defendant in the above proceedings. At or about this time the claimant was employed by Tower Hill Connellsville Coke Company, together with other attorneys, to represent the defendant in said proceedings. The claimant assisted in the drafting of the Defendant's Original Answer and the preparation of the case for trial. The claimant conducted the trial of said case upon behalf of the defendant, examining witnesses, and arguing the case before the District Court, assisting in the preparation of various briefs filed by the defendant with the District Court prior to the entry by said District Court of its Memorandum Opinion bearing date of April 5, 1928.

Claimant further assisted in the preparation of a petition to the United States Circuit Court of Appeals for the Fourth Circuit from the decree entered in these proceedings by the District Court under date of July 8, 1929. Claimant further assisted in the preparation of the record on appeal to the United States Circuit Court and in the preparation of the briefs prepared and filed by the defend-
[fol. 51] ant. Claimant assisted in the argument of the case before the United States Circuit Court of Appeals. Claimant further assisted in the preparation of a petition for a reargument and brief in support thereof which were filed with the Circuit Court of Appeals for the Fourth Circuit after it had rendered its decision dated July 8, 1929.

Claimant further assisted in the preparation of the Answers filed by the defendant to the Plaintiffs' Amended and Supplemental Bill and the Plaintiffs' Second Amended and Supplemental Bill and in the preparation of the case for trial at the hearing commenced upon November 11, 1931. Claimant assisted in the examination of witnesses and in the argument of the case before the District Court. Claimant further assisted in the preparation of the briefs on behalf of the defendant with the District Court in said proceedings. Claimant further assisted in the preparation of

an appeal to the United States Circuit Court of Appeals from the decree entered upon August 25, 1932, by the District Court in these proceedings, and in the preparation of the record on appeal including briefs on behalf of the defendant.

Claimant further assisted in the preparation of a Petition for Writ of Certiorari to the Supreme Court of the United States to review the decision of the Circuit Court of Appeals for the Fourth Circuit rendered upon April 22, 1933, including the preparation of brief accompanying said petition for writ of certiorari.

In the opinion of the Claimant, the fair and reasonable value of the services performed by him as aforesaid at the instance and request of the Tower Hill Connellsville Coke Company of West Virginia is the sum of $25,000, for which amount Claimant asks that his claim be allowed.

3. During the year 1920 Claimant was employed by Tower Hill Connellsville Coke Company of West Virginia to represent it as its attorney before the Bureau of Internal Revenue in the determination and adjustment of its Income and Excess Profits Taxes and other Federal taxes for the years 1917, 1918, 1919 and 1920. From the time of Claimant's first employment by the defendant in the year 1920 [fol. 52] and continuing down to the year 1933, the federal taxes of the defendant corporation and of its two subsidiaries Tower Hill Connellsville Coke Company of Pennsylvania and Eastern Coke Company have been in course of settlement, adjustment and litigation.

For the year 1917 the Commissioner of Internal Revenue asserted a deficiency of taxes against the Defendant and Tower Hill Connellsville Coke Company of Pennsylvania in the amount of $498,000.00. This amount represented a tax liability determined by the Commissioner of Internal Revenue over and above the tax liability shown by the Defendant and Tower Hill of Pennsylvania on their consolidated Income and Excess Profits Tax return for the year 1917. After numerous hearings and conferences in Washington, D. C., with the Bureau of Internal Revenue, it was determined that the correct tax liability of the defendant and of Tower Hill Connellsville Coke Company of Pennsylvania was $178,000.00 in excess of the amount shown upon the consolidated tax return of said corporations for the year 1917. The services rendered by this claimant were thus

instrumental in effecting for the defendant and Tower Hill of Pennsylvania a saving of $320,000.00 in taxes, together with $80,000.00 which would have been the approximate interest on said $320,000.00 up to the date of settlement. Thus the total tax saving for the year 1917 was $400,000.00.

Upon the basis of depreciation, depletion, invested capital, war profits, etc., used by the Commissioner of Internal Revenue in determining the aforesaid deficiency of $498,000.00 in the taxes of the defendant and of Tower Hill of Pennsylvania for the year 1917, there would have been a deficiency of $900,000.00 in the tax liability of Defendant and of Tower Hill of Pennsylvania for the year 1918, 1919 and 1920. The correct tax liability of said corporations for the years 1918, 1919 and 1920 was determined by the Commissioner of Internal Revenue to be $495,000.00. Upon this basis, the services of the claimant have been instrumental in effecting a tax saving of $405,000.00 for said years 1918, 1919 and 1920.

The tax liability of said corporations for the year 1920 as determined by the Commissioner of Internal Revenue is contested by said corporations. They have filed a petition with the United States Board of Tax Appeals seeking to [fol. 53] have the tax deficiency asserted against them by the Commissioner of Internal Revenue re-determined and reduced. This case is now pending before the United States Board of Tax Appeals.

Claimant has also instituted proceedings in the District Court of the United States for the Western District of Pennsylvania for the recovery of $145,000.00 of taxes paid by the Defendant, together with interest thereon amounting to $39,000.00, making a total of $184,000.00. This case is pending and undetermined.

In the opinion of the Claimant, the fair and reasonable value of the services performed by him as aforesaid at the instance and request of Tower Hill Connellsville Coke Company of West Virginia and its Pennsylvania subsidiary in connection with their Federal Income and Excess Profits tax matters is the sum of $40,000, for which amount Claimant asks that his claim be allowed.

Defendant and Tower Hill Connellsville Coke Company of Pennsylvania have made the following payments to this claimant upon account of his services as hereinabove set forth:

February 12, 1927	$5,000.00
February 23, 1927	5,000.00
July 28, 1927	6,000.00
October 17, 1927	5,000.00
June 25, 1931	8,000.00
May 12, 1932	2,500.00
Total payments	$31,500.00

The following is a statement of the Defendant's account with this Claimant:

Salary, October, 1933	$250.00
Services in litigation with the Piedmont Coal Company et al. as above set forth	25,000.00
Services in connection with Federal Income Tax matters as above set forth	40,000.00
Total	$65,250.00
Credits by cash received, as hereinabove set forth	31,500.00
Balance Due	$33,750.00

[fol. 54] Claimant respectfully asks that his claim as above set forth may be allowed against the Defendant Tower Hill Connellsville Coke Company of West Virginia.

Thomas Watson.

Duly sworn to by Thomas Watson. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

In Equity. No. 1434

[Title omitted]

PROOF OF CLAIM OF HILLMAN COAL & COKE COMPANY

To J. E. Campbell, Special Master in Chancery in the above proceedings:

In compliance with the notice given by you under date of December 26, 1933, Hillman Coal & Coke Company, a cor-

poration under the laws of the State of Pennsylvania, having its office and principal place of business in the First National Bank Building, in the City of Pittsburgh, Allegheny County, Pennsylvania, files with you its Proof of Claim against the Tower Hill Connellsville Coke Company [fol. 55] of West Virginia in the amount of $2,720.03. The nature of this claim is as follows:

Commencing in the year 1920, Tower Hill Connellsville Coke Company of Pennsylvania, which held title to and operated the mines in Fayette County, Pennsylvania, now owned by Tower Hill Connellsville Coke Company of West Virginia, entered into an agreement with the Hillman Coal & Coke Company, Hecla Coal & Coke Company, Thompson Connellsville Coke Company, and other associated and affiliated companies, engaged in the mining of coal, the manufacture of coke and the sale of coal and coke, under which agreement said companies would maintain a joint operating department, a joint engineering department, a joint general office in the City of Pittsburgh, and joint sales office in Pittsburgh, Philadelphia and New York. It was agreed that the expenses of the foregoing departments would be incurred in the name of the Hillman Coal & Coke Company, which acted as the Pool Manager. The other corporations parties to said agreement undertook to pay their pro-rata share of said joint expense.

By agreement between Tower Hill Connellsville Coke Company and the other interested companies, the expenses of the general office department and the operating department have at all times been apportioned to the individual mines of the various companies upon the basis of each mine's monthly output, with the proviso, however, that from time to time a schedule of prescribed minimum tonnages was set up for each mine, based upon a fixed, uniform percentage of the normal monthly output of said mines.

During the month of October, 1933, the general office expense for said consolidated group was $15,075.38, consisting of the following items:

Advertising	$62.50
Welfare Work	300.00
Credit Information & Collection Expense	125.00
Miscellaneous Office Expense	173.39
Office Supplies & Stationery	333.80
Postage	218.38

Rent	1,383.34
Salaries	11,669.82
[fol. 56] Telephone & Telegrams	1,371.82
Expense Accounts	734.08
Depreciation	421.00
Membership Dues	288.50
Automobile Expense & Depreciation	174.33
Maintenance & Repairs to Equipment	8.78
Insurance Workmens Compensation	10.64
	$17,275.38
Less Fixed charges not applicable to Pool Account	2,200.00
	$15,075.38

During the month of October, 1933, the operating department expenses of said consolidated group were $4,516.79, consisting of the following items, all of which charges were applicable to the pool account:

Miscellaneous Office Expense	$60.66
Office Supplies and Stationery	13.66
Rent	353.00
Salaries	3,800.75
Expense Accounts	181.92
Membership Dues	7.50
Automobile Expense & Depreciation	6.72
Insurance Workmens Compensation	46.02
Field Supplies	60.00
Total	$4,516.79

During the month of October, 1933, the Engineering Department expenses of said consolidated group were $2,464.28, consisting of the following items:

Miscellaneous Office Expense	$76.67
Office Supplies and Stationery	19.84
Rent	312.00
Salaries	1,916.65
Expense Accounts	54.83
Automobile Expense & Depreciation	68.41
Maintenance & Repairs to equipment	1.25

Insurance Workmens Compensation	12.37
Field Supplies	2.26
	$2,464.28
[fol. 57] Less charges not applicable to Pool Account	483.10
	$1,981.18

By agreement between Tower Hill Connellsville Coke Company and the other interested companies, Engineering costs were apportioned as follows:

Each mine was charged with the actual time cost of work done specifically for that mine, and each mine was charged with that portion of all overhead expenses as was represented by the ratio of the direct time charge of said mine to the total time charges of all mines in that month.

In accordance with the agreement between Tower Hill Connellsville Coke Company and the other interested companies as above stated, Tower Hill Connellsville Coke Company's proportion of the general expenses of said joint operations for the month of October, 1933, was as follows:

General Office Expense	$1,995.35
Operating Department Expense	610.96
Engineering Services	113.72
Total	$2,720.03

All of the assets of the defendant Tower Hill Connellsville Coke Company of West Virginia passed into the possession of its receivers on or about October 26, 1933, and consequently the above items remained due, owing and unpaid. This claimant Hillman Coal & Coke Company has been obliged to pay said items representing the proportion of the joint expenses as above enumerated which Tower Hill Connellsville Coke Company of West Virginia had agreed to pay.

Hillman Coal & Coke Company, by W. L. Affelder, Vice President; by J. M. Leithead, Ass't Treasurer.

Attest:

Thos. Watson, Secretary. (Corporate Seal.)

[fol. 58] *Duly sworn to by W. L. Affelder et al. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

In Equity

No. 1434

[Title omitted]

PROOF OF CLAIM OF J. H. HILLMAN, JR., AND A. B. SHEETS AS SURETIES UPON THE SUPERSEDEAS BOND OF TOWER HILL CONNELLSVILLE COKE COMPANY

To J. E. Campbell, Special Master in Chancery in the above proceedings:

In compliance with the notice given by you under date of December 26, 1933, J. H. Hillman, Jr., and A. B. Sheets, both residents of Pittsburgh, Allegheny County, Pennsylvania, file with you their Proof of Claim of a contingent [fol. 59] liability against the Tower Hill Connellsville Coke Company of West Virginia.

1. Upon August 25, 1932, the District Court entered a decree in the above proceedings which provided in Paragraph 2 thereof as follows:

"That the business and affairs of Tower Hill Connellsville Coke Company of West Virginia, Defendant in this cause, be terminated and wound up; that its properties and assets be sold and converted into money; and that distribution thereof be made to its creditors and stockholders according to their respective rights and priorities."

2. Said decree entered August 25, 1932, further provided in Paragraph 7 thereof as follows:

"That Defendant having indicated its intention to appeal to the United States Circuit Court of Appeals for the Fourth Circuit, the operation of this decree shall be suspended for the period of thirty days from the date of the entry hereof to enable the Defendant to perfect such appeal and, in accordance with the Stipulation and Agreement mentioned in the preceding paragraph hereof, the supersedeas bond on

such appeal is fixed at one hundred thousand ($100,000.00) dollars, with the sureties and security provided in said Stipulation and Agreement; and likewise in accordance with said Stipulation and Agreement, it is ordered that the status of Defendant's properties, assets, liabilities and business be maintained and preserved in the manner and for the time provided in said Stipulation and Agreement."

3. There was filed with the decree entered August 25, 1932, a written Stipulation and Agreement between the plaintiffs and the defendant, which said Stipulation and Agreement was directed by said decree to be filed as a part of the record in the case, and to be included in the transcript of the record upon appeal. Said stipulation and Agreement provided in Paragraph First as follows:

"Defendant's supersedeas bond upon its appeal to the United States Circuit Court of Appeals for the Fourth Circuit shall be in the sum of one hundred thousand ($100,-[fol. 60] 000.00) dollars, conditioned as provided by the Act of Congress. The sureties upon said bond shall be J. H. Hillman, Jr., and A. B. Sheets, of Pittsburgh, Pennsylvania, who shall deposit, or cause to be deposited, with The Central Trust Company, at Charleston, West Virginia, listed securities approved by attorneys for Plaintiffs or by this Court, of a market value at the time of deposit of not less than one hundred thousand ($100,000.00) dollars, as collateral security to guarantee the punctual payment and discharge of such liability, if any, as said securities or either of them, may incur under or by reason of said bond, *none of said securities to be the property of Defendant*, and the instrument effecting such deposit to be in such form and to contain such provisions as shall be approved by attorneys for Plaintiffs or by this Court."

4. Tower Hill Connellsville Coke Company of West Virginia, Defendant in said proceedings, duly perfected its appeal to the United States Circuit Court of Appeals for the Fourth Circuit, and in connection therewith said defendant executed a supersedeas bond in the sum of $100,000.00, conditioned as provided by the Act of Congress. The said defendant executed said bond as principal, and these claimants, J. H. Hillman, Jr., and A. B. Sheets, of Pittsburgh, Pennsylvania, executed said supersedeas bond as sureties.

5. These claimants further complied with the provisions of the aforesaid First Paragraph of the Stipulation and Agreement by depositing listed securities, approved by attorneys for Plaintiffs, having a market (70) value at time of deposit of not less than $100,000.00, as collateral security to guarantee the punctual payment and discharge of such liability, if any, as said sureties, or either of them, might incur under or by reason of said bond.

6. The securities deposited aforesaid by these claimants with The Central Trust Company at Charleston, West Virginia, as collateral security to guarantee the punctual payment and discharge of the liability, if any, of these claimants as said sureties for the defendant, Tower Hill Connellsville Coke Company of West Virginia, were as follows:

[fol. 61] Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938

No. A00001441—With October 15, 1932 and A. S. C. A.	$5,000.00

United States Treasury 3⅛% Bonds of 1946-1949

No. 20407H	$10,000.00
18517H	10,000.00
19782B	10,000.00
15447H	10,000.00
34062B	10,000.00
12787H	5,000.00
4407H	5,000.00
6403C	5,000.00
18568J	5,000.00
4744D	5,000.00
15111A	5,000.00
92433C	1,000.00
92434D	1,000.00
92435E	1,000.00
92436F	1,000.00
92437H	1,000.00
92438J	1,000.00
92439K	1,000.00
92440L	1,000.00
92441A	1,000.00
92442B	1,000.00

92443C	1,000.00	
92444D	1,000.00	
92445E	1,000.00	
92446F	1,000.00	
92447H	1,000.00	
92448J	1,000.00	
92449K	1,000.00	
21483C	1,000.00	
85589K	1,000.00	
85590L	1,000.00	$100,000.00
With December 15, 1932, and all subsequent coupons attached		$105,000.00

None of the aforesaid securities are or ever were the property of Tower Hill Connellsville Coke Company of West Virginia.

[fol. 62] 6. The United States Circuit Court of Appeals for the Fourth Circuit affirmed the decree of the District Court entered upon August 25, 1932; and the Supreme Court of the United States refused the defendant's petition for a writ of certiorari to review the decision of said Circuit Court of Appeals for the Fourth Circuit.

7. Upon October 26, 1933, the officers of the defendant, Tower Hill Connellsville Coke Company of West Virginia, in compliance with the decree of the District Court, paid to the receivers appointed to liquidate the assets of the defendant, all the cash in defendant's possession, amounting to the sum of $881,049.42, and further turned over and delivered to the said receivers all the stock, warrants, debentures, notes, agreement for royalties receivable, and other items of personal property, and furthermore delivered to said receivers possession of the lands, plants and equipment of the defendant, constituting its mines and coke operations in Fayette County, Pennsylvania.

8. That the assets in the hands of the receivers of the defendant are ample and sufficient in amount and value to immediately pay and discharge all of the liabilities of the defendant, including any damages and costs which the plaintiffs are entitled to recover from the defendant corporation upon the aforesaid supersedeas bond, leaving a substantial balance available for distribution to defendant's

stockholders. It thus appears that the defendant or its receivers are in position to comply with defendant's obligation as the principal obligor upon said surety bond, to protect, indemnify and save harmless these claimants, from any and all liability as sureties upon the aforesaid supersedeas bond.

9. That Claimants through their attorneys have requested the plaintiffs to consent to the entry of an order in the above case by the District Judge, releasing and discharging these Claimants from all liability as sureties upon the aforesaid supersedeas bond of the defendant, and further authorizing, directing and empowering The Central Trust Company, at Charleston, West Virginia, to surrender, turn over and deliver to these claimants the securities hereinbefore enumerated in paragraph "6" hereof. But the plaintiffs have refused to consent to the entry of such order [fol. 63] as requested, and have indicated to claimants that it is the intention of the plaintiffs to assert liability against the claimants as sureties upon said supersedeas bond.

10. That the District Court of the United States for the Southern District of West Virginia has not up to this time been called upon to determine, and has not determined that there is any liability whatsoever upon said supersedeas bond, or that said liability should fall upon these claimants and not upon Tower Hill Connellsville Coke Company of West Virginia as the principal obligor upon said supersedeas bond, or that the securities deposited by these claimants with The Central Trust Company, at Charleston, West Virginia, should not be returned to these claimants but should be sold and the proceeds applied to the discharge of the liability of these claimants as sureties upon said supersedeas bond.

11. That these claimants without admitting liability as sureties upon said supersedeas bond, and without prejudice in any manner to their right to contest any liability upon the supersedeas bond, but for the purpose of preserving their rights in the premises, pending the decision by the District Court of the United States for the Southern District of West Virginia, hereby file their Proof of Claim against Tower Hill Connellsville Coke Company of West Virginia and its assets in the hands of its receivers, in the sum of $105,000.00, or any other amount which these claimants may be compelled to pay as sureties upon the super-

sedeas bond of the defendant. These claimants as sureties assert their rights to be protected, indemnified and saved harmless from any and all liability upon said supersedeas bond by Tower Hill Connellsville Coke Company of West Virginia, which is the principal obligor upon said bond.

12. In the event it is ultimately adjudicated that these claimants are not liable upon said supersedeas bond, and in event they are properly discharged and released from liability as sureties, and in event the securities enumerated in paragraph "6" hereof are returned to these claimants, than and in such event these claimants will withdraw any and all claim hereon or hereunder against the defendant corporation.

J. H. Hillman, Jr., By Thos. Watson, Atty. A. B. Sheets.

[fol. 64] *Duly sworn to by A. B. Sheets. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

In Equity. No. 1434

[Title omitted]

ORDER FILING ANCILLARY BILL ETC.—Feb. 19, 1934

This day came H. D. Rummel, A. S. Alexander and George S. Baton, Receivers of Tower Hill Connellsville [fol. 65] Coke Company of West Virginia, heretofore appointed herein, by counsel, and tendered and asked leave to file their Ancillary Bill of Complaint against J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, and upon consideration thereof, it is ordered:

1. That said Ancillary Bill of Complaint be, and hereby it is filed in this Court, with leave to the Defendants to move to dismiss, answer, or make such other defense thereto as may be proper, and for convenience the Clerk be, and hereby he is directed to give it a separate number but that it and all proceedings pursuant thereto shall be ancillary to this cause.

2. That each of said parties named as Defendant in said Ancillary Bill be, and hereby he or it is required to move to dismiss or to file his or its answer or other defense to said Ancillary Bill in the Clerk's office on or before March 19, 1934.

3. That the Receivers be, and hereby they are directed to cause a true and correct copy of this order and of said Ancillary Bill, certified by the Clerk, to be inserted in envelopes addressed to the following respective parties: J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, each at First National Bank Building, Pittsburgh, Pennsylvania, and each such envelope to be properly stamped and registered and to be deposited in the United States mail at Charleston, West Virginia, on or before February 20, 1934; and on or before said latter date a copy of this order and of said Ancillary Bill, likewise certified by the Clerk, to be delivered at the office of E. W. Knight, Esq., in Charleston, West Virginia.

4. All questions as to the jurisdiction of this Court and other questions are reserved by this Court for future decision as such questions may arise, and nothing is herein decided except that the bill shall be filed and notice thereof be had as directed above.

[fol. 66] IN UNITED STATES DISTRICT COURT

In Equity. No. 1434

[Title omitted]

MOTION TO VACATE ORDER OF COURT ENTERED FEBRUARY 19, 1934, AND TO QUASH SERVICE OF SAID ORDER AND OF THE BILL OF COMPLAINT THEREIN MENTIONED—Filed March 19, 1934

To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

Appearing specially for the purpose of making this motion and not intending to submit himself or itself to the jurisdiction of this Court but solely for the purpose of

questioning such jurisdiction come J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company each by his or its counsel, and move the Court to vacate its order entered at the above Number in Equity on February 19, 1934 and to quash the service of the said order and of the Ancillary Bill of Complaint therein mentioned and filed at No. 3370 in Equity of this Court in which cause A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of said Tower Hill Connellsville Coke Company of West Virginia, are plaintiffs and the said J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and [fol. 67] Hecla Coal and Coke Company are defendants, because

(a) At the time of the entry of the said order, the filing of the said Ancillary Bill and the alleged service thereof upon each of the defendants and ever since said date no one of the defendants was or is a citizen or resident or inhabitant of or to be found within or was doing business within the Southern District of West Virginia, or anywhere within the State of West Virginia.

(b) The said J. H. Hillman, Jr., A. B. Sheets and Thomas Watson were at the time of the filing of this suit and always since have been each a citizen and inhabitant of the Commonwealth of Pennsylvania and a resident of the City of Pittsburgh, Allegheny County, in said Commonwealth. Hillman Coal and Coke Company and Hecla Coal and Coke Company is each a corporation incorporated and existing under the Laws of the Commonwealth of Pennsylvania, having its domicile in the City of Pittsburgh, in said Commonwealth and is a citizen resident and inhabitant of said Commonwealth within the purview of Section 51 of the Judicial Code of the United States with respect to venue.

(c) Your Honorable Court is without jurisdiction over any of the said individuals, or either of the said corporations named as parties defendant in the said Ancillary Bill of Complaint. Neither the alleged mailing to each of them in the manner set forth in the said order of court entered February 19, 1934, of a copy of the said order and of a copy of the said Ancillary Bill of Complaint therein referred to, nor the alleged delivery of such copies at the office of E. W. Knight, Esq., Charleston, West Virginia constitute

service upon the defendants named in the said Ancillary Bill of Complaint.

E. W. Knight, Brown, Jackson & Knight, Alter, Wright and Barron, Attorneys for J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company appearing specially for the sole purpose aforesaid.

[fol. 68] In United States District Court

In Equity

No. 1434

Piedmont Coal Company, a Corporation created and exixting under the laws of the Commonwealth of Pennsylvania, and G. S. Harah, Edgar S. Hackney and J. E. Hess, the three individuals residing in the City of Uniontown, County of Fayette, and Commonwealth of Pennsylvania, and all the plaintiffs being citizens of said Commonwealth and domiciled in the Western District thereof,

vs.

Tower Hill Connellsville Coke Company of West Virginia, a citizen of the State of West Virginia, domiciled in the Southern District thereof.

Decree—July 30, 1934

This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

(1) That the Memorandum Decision as this day amended, filed and made a part of the record in Equity Cause No. 3370, be and hereby is also filed and made a part of the record in this cause.

(2) That for the reasons stated in the said Memorandum Decision as amended, the motion of J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company, entitled "Mo-

tion to Vacate Order of Court Entered February 19, 1934 and to Quash Service of said Order and the Bill of Complaint Therein Mentioned" be and hereby it is sustained, and the said Order of Court entered February 19, 1934 be and hereby it is vacated, but this decree is without prejudice to A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, to assert the matters of fact and to seek the remedies set out in said Bill of Complaint in any court having jurisdiction.

[fol. 69] (3) That said J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company and Hecla Coal and Coke Company shall recover their costs accrued upon said Motion.

Thereupon A. S. Alexander, H. D. Rummel and George S. Baton, Receivers of Tower Hill Connellsville Coke Company of West Virginia, by counsel, excepted to said decree of the Court, which exception is allowed, and at their instance a bill is sealed.

IN UNITED STATES DISTRICT COURT

In Equity

No. 1434

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed July 30, 1934

And the said A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, assign the following errors in the record and proceedings in said cause:

(1) The District Court of the United States for the Southern District of West Virginia erred in entering its decree of July 30, 1934.

(2) Said Court erred in sustaining the motion of J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal

and Coke Company and Hecla Coal and Coke Company, filed March 19, 1934, entitled "Motion to Vacate Order of Court Entered February 19, 1934, and, to Quash Service [fol. 70] of said Order and of the Bill of Complaint Therein Mentioned."

(3) Said Court erred in not overruling said Motion.

(4) Said Court erred in vacating its order entered February 19, 1934.

(5) Said Court erred in entering its decree of July 30, 1934, at No. 3370 in Equity (known as the "Ancillary Cause"), sustaining the motion filed therein March 19, 1934, and dismissing the Ancillary Bill of Complaint filed therein February 19, 1934.

For which errors, said A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers, pray that said decree of the United States District Court for the Southern District of West Virginia, entered July 30, 1934 in the above entitled cause, be reversed and the cause remanded, with directions to overrule said motion and to re-instate its said order entered February 19, 1934, and for such other and further relief as may be proper in the premises.

Edwin W. Smith, William M. Robinson, E. C. Higbee, Arthur S. Dayton, Counsel for Appellants.

IN UNITED STATES DISTRICT COURT

STIPULATION TO PREPARE TRANSCRIPT OF RECORD AND PRINT SAME UNDER RULE 23 OF THE UNITED STATES CIRCUIT COURT OF APPEALS—Filed Aug. 6, 1934

[Title omitted]

[fol. 71] It is hereby stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above styled cause, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va., and that it be printed

under the supervision of the Clerk of that Court, in accordance with Rule 23.

Arthur S. Dayton, Counsel for Appellants.

August 3, 1934.

Edward W. Knight, Counsel for Appellees.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 30, 1934

ORDER ALLOWING APPEAL—Entered of record July 30, 1934

BOND ON APPEAL

(Executed by A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, as principals, and United States Fidelity and Guaranty Company, a corporation, as surety, in the sum of Two Hundred Dollars, and conditioned to prosecute appeal to effect and answer all costs. Dated July 30, 1934, and approved and filed as of the same date).

CITATION

(Issued July 30, 1934, and returnable at Richmond within forty days from the date thereof. Service accepted thereon as of the 30th day of July, 1934).

[fol. 72] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 73] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3737

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, Appellants,

versus

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a corporation, and Hecla Coal and Coke Company, a corporation, Appellees

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston. In Equity.

DOCKET ENTRIES

August 14, 1934, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond and citation are certified up under section 7 of Rule 14.

Same day, the appearance of Arthur S. Dayton is entered for the appellants.

August 21, 1934, the special appearance, for the sole purpose of raising the question of jurisdiction, of Geo. E. Alter, Alexander J. Barrón and Edward W. Knight is [fol. 74] entered for the appellees.

August 24, 1934, twenty-five copies of the printed record are filed.

September 29, 1934, the appearance of Edwin W. Smith, E. C. Higbee, William M. Robinson and Arthur S. Dayton is entered for the appellants.

Argument of Cause

October 12, 1934 (October Term, 1934,) cause came on to be heard, together with No. 3736, before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3736

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, Appellants,

versus

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a corporation, and Hecla Coal and Coke Company, a corporation, Appellees

[fol. 75] No. 3737

A. S. ALEXANDER, H. D. RUMMEL AND GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, Appellants,

versus

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and Hecla Coal and Coke Company, a corporation, Appellees

Appeals from the District Court of the United States for the Southern District of West Virginia, at Charleston

Argued October 12, 1934. Decided January 22, 1935

Before Parker, Northcott and Soper, Circuit Judges

E. C. Higbee and Arthur S. Dayton (Edwin W. Smith and Wm. M. Robinson on brief) for Appellants, and E. W. Knight (George E. Alter and Alexander J. Barron on brief) for Appellees.

OPINION—Filed Jan. 22, 1935

NORTHCOTT, Circuit Judge:

These are appeals from two decrees entered in the District Court of the United States for the Southern District of West Virginia, one of which was entered in a suit in

equity, wherein Piedmont Coal Company and others are plaintiffs and Tower Hill Connellsville Coke Company of [fol. 76] West Virginia is defendants, and permitted the filing of an ancillary bill. The other was entered in the ancillary proceedings so commenced, in which the receivers of Tower Hill Company, the appellants, are plaintiffs and the appellees are defendants. The original suit has been twice before this Court (33 Fed. (2d) 703; 64 Fed. (2d) 817), in each of which certiorari was denied (280 U. S. 607, 64 L. Ed. 650; 290 U. S. 675, 78 L. Ed. 86).

Upon the last appeal in the original cause this court affirmed the decree of the District Court, entered August 25, 1932, which directed that the business and affairs of Tower Hill be terminated and wound up, its property and assets sold and converted into money and distribution thereof made to its creditors and stockholders according to their respective rights and priorities. For that purpose the District Court had appointed A. S. Alexander, H. D. Rummel, and George S. Baton receivers of all the property and assets of Tower Hill of whatsoever character and wheresoever situate, with power to procure the appointment of ancillary receivers, whenever and wherever in their judgment such ancillary receivers should be necessary to effectuate any of the provisions of the decree and to institute and prosecute, either in their own names or through such ancillary receivers, all suits and proceedings necessary to recover possession of all the property and assets of the corporation.

On December 12, 1933, the District Court entered an order in the cause referring same to J. E. Campbell as special master, to take, state, and report to the court an account, showing all the debts, obligations and claims against Tower Hill, with the nature amount, and respective priorities thereof, the owners of the preferr d and common stock of Tower Hill and such other matters as any party in interest might require. And on January 30, 1934, at a hearing duly held by the Special Master in Charleston, West Virginia, pursuant to the order of reference, J. H. Hillman, Jr., A. B. Sheets and Thomas Watson, all of whom are citizens of the Commonwealth of Pennsylvania residing in the Western District thereof, and Hillman Coal and Coke Company and Hecla Coal and Coke Company, each of which is a corporation of the Commonwealth of Pennsylvania

having its principal place of business in the Western District thereof, filed certain proofs of claim as creditors and [fol. 77] stockholders of Tower Hill and testimony was taken with regard thereto. The claim of Hecla is that it is a holder of preferred and common stock of Tower Hill, and the claims of the other claimants are for alleged debts said to be owing by Tower Hill. Each of the claims remains pending and undetermined before the Special Master.

On February 19, 1934, the receivers asked leave of the District Court to file an ancillary bill of complaint against the claimants above named who had filed claims with the Special Master. The ancillary bill tendered for filing at that time alleged that claimants Hillman, Sheets and Watson as directors of Tower Hill had mismanaged the affairs of that corporation and had misapplied its assets in the payment of improper salaries and in the transfer of assets for the benefit of other corporations in which they were interested; that, as a result of their mismanagement, Hecla had received valuable property through an exchange with the Redstone Coal & Coke Co., to which Tower Hill was a party, and in the course of which Tower Hill had parted with property of great value and received property of insignificant value in return; and that the claim of the Hillman Company was based upon an arrangement between that company and Tower Hill growing out of the mismanagement of the latter by Hillman, Sheets, and Watson and that the Hillman Company was liable to the receivers for moneys which it had received pursuant to this arrangement. Most of the causes of action asserted in the ancillary bill appear not to have grown out of the transactions which were the basis of the claims filed with the receivers, but to constitute independent claims in behalf of the receivers against the claimants. The court ordered the ancillary bill filed, with leave to the defendants therein named, however, to move to dismiss, answer or make such other defense thereto as might be proper.

On March 19, 1934, a motion to vacate the order of court entered February 19, 1934, and to quash the service of that order and the ancillary bill of complaint was filed by the defendants named in the ancillary bill, each appearing specially for the purpose of making the motion and without submitting to the jurisdiction of the court, but solely for

the purpose of questioning that jurisdiction. The reasons assigned in the motion were that, at the time of the entry of the order, the filing of the bill and the alleged service [fol. 78] thereof upon each of the defendants, no one of the defendants was or had since been a citizen, resident or inhabitant of, or had been doing business within, the Southern District of West Virginia, but that each of said defendants was a citizen, resident, and inhabitant of the city of Pittsburgh, in the Western District of Pennsylvania, and that no legal service had been had upon any of them. Each of the defendants filed also a motion to quash the service of the ancillary bill and to dismiss it for want of jurisdiction, on the same grounds as those alleged in the motion filed in this cause. The Court sustained the motion and dismissed the ancillary bill, finding that none of the defendants therein named was an inhabitant of the Southern District of West Virginia, but that each of them was at the time of the filing of the bill and had since been a resident of the Commonwealth of Pennsylvania. The receivers have appealed in both the original and the ancillary proceedings, but both appeals present the same question, viz., the correctness of the order dismissing the ancillary bill.

We think that the learned judge below was correct in holding that the court had not acquired jurisdiction to award any affirmative relief against the defendants named in the ancillary bill on the causes of action therein asserted against them which constituted counterclaims to the claims filed with the receivers, and not mere defenses to those claims. The question involved is not one as to the jurisdiction of the court over the causes of action asserted in the ancillary bill, for it is well settled that the courts of the United States have jurisdiction to entertain, either in equity or at law as may be appropriate, ancillary proceedings in aid of a receivership suit pending in a federal court, even though other elements of federal jurisdiction, such as diversity of citizenship or the jurisdictional amount, may be lacking. White vs. Ewing, 159 U. S. 36; Pope vs. L. N. & A. C. R. Co., 173 U. S. 573; Kirkland vs. Knox, 230 Fed. 806; Carey vs. McMillan (C. C. A., 8th), 289 Fed. 380; Hart vs. Wiltsee, 19 Fed. (2d) 903; Hume vs. City of New York, 225 Fed. 488; Peck vs. Elliott, 79 Fed. 10. The question is whether the court acquired such jurisdiction over the persons who filed claims with the receivers as would

authorize the granting of relief against them on counterclaims on which affirmative personal relief was asked and [fol. 79] which were not mere defenses to the claims filed; and we think it clear that this question must be answered in the negative.

The position of appellants is that these persons made themselves parties to the original cause by filing claims before the special master, and that no further service of process upon them, or consent to jurisdiction on their part, was necessary to give the court jurisdiction to award relief against them on the ancillary bill. The answer to this, however, is that under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause. Elkins vs. First Nat. Bank of the City of New York (C. C. A., 4th), 43 Fed. (2d) 777; Acme White Lead & Color Works vs. Republic Motor Truck Co., 285 Fed. 88; Jones vs. Laughlin & Sands (C. C. A., 2d), 79 Fed. 913; Youtsey vs. Hoffman, 108 Fed. 693; Sands vs. Greeley Co., 80 Fed. 195; Clark on Receivers, vol. 1, p. 717. And where an ancillary bill, as does the bill here, brings in new parties to the original suit and charges new matter as a basis of relief, the proceeding as against such new parties is an original, not an ancillary, proceeding, and they must be properly served with process to give the court jurisdiction. Duan vs. Clark, 8 Pet. 1; Smith vs. Norfolk, 115 U. S. 143, 148; G. & C. Merriman Co. vs. Saalfield, 241 U. S. 22; Manning vs. Berdan, 132 Fed. 382; Bowers vs. Christian, 16 Fed. 729; Hart vs. Wiltsee, supra.

A case very much in point is Whelan vs. Enterprise Trans. Co., 164 Fed. 95, a decision by Circuit Judge Lowell. That case involved a petition which was filed by a receiver of an insolvent corporation and was treated by consent as a plenary suit in equity ancillary to the principal receivership suit. Recovery was asked against one Paige for moneys collected by him which were alleged to be the property of the corporation. Paige had filed a claim with the receiver. The court held that, although the federal court would have jurisdiction of an action against Paige as being ancillary to the main suit, the remedy at law was adequate and suit in equity could not be maintained. The court considered whether the fact that he had filed a claim with the receiver did not bring him within the jurisdiction of the court for the purpose of the collection of the receiver's claim against him, saying:

[fol. 80]. "The court has next to consider if the fact that Paige filed a claim against the estate in the hands of a receiver appointed by a court of equity brings him within the jurisdiction of that court of equity for the purpose of the collection of the receiver's claim against him. That Paige cannot obtain as matter of right a jury trial concerning his claim against the estate may be admitted, but from this it does not follow that he waives his right to a jury trial in case of a claim brought by the receiver against him, where that claim is made, not by way of set-off, but for the purpose of taking money out of Paige's pocket. Upon the whole, I think that Paige is right in this contention also."

The decision of Judge Evans in Youtsey vs. Hoffman, 108 Fed. 693, is also very much in point. In that case Hoffman and Feltman had filed a claim in a receivership suit in a state court. The receiver filed what he termed an "answer and set-off" asking recovery of damages against Hoffman and Feltman for mismanagement of the corporation while acting as its officers. The action thus instituted was removed into the federal court and a motion to remand it to the state court was denied on the ground that it was a new and independent suit, separate and distinct from the receivership suit pending in the state court. Judge Evans said:

"As the receiver in the case—the mere officer of the court—was not then a party to the suit, it is clear that the permission given to him to file an answer and set-off in a suit to which he was not previously made a party was altogether unauthorized and irregular. His pleading, under the circumstances, even when coupled with the leave of the court, must therefore be regarded as the beginning of a new action, and its irregular injection into the one already pending cannot give it a higher value or better position than an independent action would have done in determining the question now before us. * * * As the claims filed by Hoffman were admitted to be just, thus closing the receiver's case as to them, and as there were new and distinct claims stated and set up in the so-called answer and set-off of the receiver, which had no connection with Hoffman's claims, due process of law manifestly required that actual [fol. 81] notice, in the way of the service of a summons,

should be given to Hoffman in order to bring him before the court upon that pleading. * * * In other words, the receiver, merely as such, was never a party to the suit, unless the filing of the answer and so-called set-off made him a defendant without an express order of the court to that effect, which I doubt; and certainly the receiver, as such, was not entitled ex officio to plead therein any set off against Hoffman, who was at most, only a quasi party to certain other issues in the suit."

It is argued that the court has jurisdiction of the parties to pass upon the matters set up in the ancillary bill, because it is said that a claimant, by filing claim with a receiver and invoking the jurisdiction of the court for the adjudication of that claim, consents that the court adjudicate any claim which the receiver may have against him. The case is said to be analogous to a suit in equity in which the complainant, by filing the suit against the defendant, impliedly consents to being sued by way of counterclaim in a court which would not otherwise have jurisdiction of the cause of action therein asserted. See Equity Rule 30; Texas Co. vs. Borne Scrymser Co. (C. C. A., 4th), 68 Fed. (2d) 104; and General Electric Co. vs. Marvel Rare Metals Co., 287 U. S. 430, in the last of which the Supreme Court said: "The setting up of a counterclaim against one already in a court of his own choosing is very different, in respect to venue, from hailing him into that court."

One filing a claim with a receiver, however, is in a very different position from one who has filed a bill in equity. He is not in a court of his own choosing, but in a court selected by others, which has taken into its possession the only property from which he can obtain payment of his claim. The complainant who files a bill in equity, and thus subjects himself to equitable counterclaims of the defendant, has had the option of going into either the state or federal courts and of suing in any district in which jurisdiction of the defendant can be obtained. The claimant who files claim with a receiver, on the other hand, has had no option whatever. Unless he promptly files his claim with the court which has taken jurisdiction of the property, his right to share in the distribution of that property will be gone; and that court passes upon his claim, without regard [fol. 82] to citizenship, the amount involved, or other jurisdictional requirements, merely because of the necessity arising out of the fact that it has taken possession of property.

The claimant in such case files his claim in the receivership suit in order that he may obtain his equitable portion of the property in receivership upon its distribution by the court; and, as we said in a former opinion herein, he makes himself a party to the cause pro hac vice, i. e., merely for the purpose of having his claim allowed and of sharing in the distribution of the property in which he claims an interest because of the receivership. He has an equitable interest in the property which is in the hands of the receiver; and his position, in so far as coming into the receivership suit for the assertion of his rights is concerned, is more nearly analogous to that of a person whose property has been attached, and who must appear and defend for the protection of his interest in the property, than to that of a complainant who has voluntarily gone into a court and filed a bill in equity. To permit the receiver to assert in the receivership suit an independent cause of action at law or in equity against such claimant, or to recover on a counterclaim against him merely because he has filed his claim in the receivership suit, would be as unfair as to permit a plaintiff in an attachment suit to amend his complaint to allege a new and different cause of action against a defendant in attachment, or to permit a non-resident, who has appeared to defend a suit on one cause of action, to be subjected while in the jurisdiction to suit on another and independent cause of action. It is well settled that, in an attachment suit, it is not permissible to amend the pleadings to set up a new cause of action (6 C. J. 482), and that one who comes into the jurisdiction of a court for the protection of his interest in litigation there pending is immune from service of process in another suit. Page Co. vs. McDonald, 261 U. S. 446; Stewart vs. Ramsey, 242 U. S. 128.

In so far as the matters set up in the ancillary bill constitute causes of action at law, there is an additional reason why they may not be asserted in the receivership suit. That suit is a proceeding in equity; and the claims filed by claimant and any counterclaims thereto would necessarily be heard in equity. The claimants, by filing their claims in a court of equity, waive their right of jury trial with respect to the claims filed, but they do not waive such right with [fol. 83] respect to independent claims against them which the receivers may seek to assert by way of counterclaim. It is well settled that a counterclaim involving a cause of

action at law cannot be asserted in a suit in equity, because of the right of the party against whom it is asserted to a jury trial under the Seventh Amendment to the Constitution. American Mills Co. vs. American Surety Co., 260 U. S. 360; Sinclair Refining Co. vs. Midland Oil Co. (C. C. A., 4th), 55 Fed. (2d) 42, 47.

For the reasons stated, we think that the court below was without such jurisdiction of the parties as would authorize it to adjudicate the counterclaims asserted in the ancillary bill or to grant any affirmative relief with respect thereto. It did have jurisdiction, however, to pass upon any defense, legal or equitable, which might be asserted against the claims filed with the receivers, and to stay action upon those claims until the counterclaims asserted in the ancillary bill could be adjudicated in a court of competent jurisdiction so that they could be set off against the claims, or the amounts payable thereunder, as might be proper. We think, therefore, that, instead of dismissing the ancillary bill, the court below should have retained it, treating it as a petition to stay action on the claims until the counterclaims therein asserted could be adjudicated in a court of competent jurisdiction, and as setting up defenses to the claims in the cases where the matters alleged could be considered as purely matters of defense as distinguished from counterclaims. The order appealed from will accordingly be modified and the cause will be remanded to the end that the court below may give consideration to the question of staying action on the claims pending the adjudication of the counterclaims in a court of competent jurisdiction, and that it may consider any matter set up in the bill which may appropriately be considered as matter of defense against the claims filed. The court should require, however, that new pleadings be filed in lieu of the ancillary bill, setting up as against each claim filed with the receivers any purely defensive matter which the receivers may desire to assert, together with any matter which would justify the court in staying action on the claims pending the adjudication of any counterclaim or counterclaims in a court of competent jurisdiction. Modified.

[fol. 84] IN UNITED STATES CIRCUIT COURT OF APPEALS

SEPARATE OPINION

SOPER, Circuit Judge:

I concur in the general conclusion of the court that a receiver in equity is entitled in certain contingencies to resist the payment of claims against the estate by the presentation of set-offs or counterclaims against the claimants. The opinion holds in effect that the equity court has jurisdiction: (1) to pass upon a legal or equitable defense to a claim which grows out of the same transaction and is not in excess of the amount of the claim; (2) to stay action on a claim, if a meritorious set-off or counterclaim in law or equity, growing out of the same transaction is alleged, and affirmative relief against the claimant is sought, until adjudication may be had in an independent suit brought by the receiver against the claimant; (3) to stay action on a claim, if a meritorious set-off or counterclaim in law or in equity, growing out of an independent transaction, is alleged, until adjudication may be had in an independent suit brought by the receiver against the claimant.

In my opinion, the jurisdiction of the court to consider a set-off or counterclaim filed by a receiver is even broader. It should be held that the equity court also has jurisdiction (1) to adjudicate fully any set-off or counterclaim in law or equity, growing out of the same transaction, and to grant affirmative relief to the receiver if the facts warrant such action; and (2) to adjudicate any set-off or counterclaim in equity, based on an independent transaction, and to grant affirmative relief to the receiver if the facts warrant such action.

It seems clear that the court has full power to adjudicate completely all set-offs or counter-claims growing out of the same transaction, and the efficient administration of justice requires it, if it can be done in accordance with the federal constitution. Power to pass upon the merits of a claim, and to consider all defenses growing out of the same transaction to the amount of the claim, is conceded. The limitation implied seems to be unwarranted, and no authority is cited to sustain it. Courts of equity in the administration of estates have long exercised jurisdiction to con-

sider claims presented against the property in their charge, and this function obviously cannot be fully performed, unless all defenses to a claim growing out of the transaction on which the claim is based, whether in excess of the claim [fol. 85] or not, may be considered. The right to adjudicate fully all defenses is inherent in the power to adjudicate the claim. The fact that the claimant is deprived of a jury trial presents no constitutional difficulty; for the proceeding is in equity, and the claimant may not demand a jury trial even though his claim is based upon a right of action at law; and as to the set-offs or counterclaims presented by the receiver, the court of equity, having acquired jurisdiction, will retain it, in accordance with the well established principle of equity jurisprudence, until the whole controversy has been disposed of, although rights of action are involved which ordinarily would be cognizable only in a court of law. It may be noted in passing that the opinion of the court does not question the power of the chancellor to pass on the merits of a legal defense to a claim not in excess of the claim itself.

Furthermore, there seems to be no important reason why Equity Rule 30, promulgated November 4, 1912, should not be applied to the situation which arises when a receiver has a set-off or counterclaim in equity, growing out of an independent transaction, against a claimant. This rule provides in substance that the defendant in his answer to a suit in equity may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim shall have the same effect as a cross suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the counterclaim. By the passage of this rule, the Supreme Court, in order to make it possible to put an end to all controversies between the same parties in a single suit, changed the former practice which confined set-offs and counterclaims to those which arose out of the transaction that formed the basis of the original suit. Since the filing of a disputed claim against a receiver in an equity proceeding is in one aspect a separate suit, it falls within the scope of Equity Rule No. 30, and the receiver should have the same right to set-off or counterclaim as would have been accorded to the corporation before the receiver was appointed. The decisions

relied on in the opinion of the court, Whelan vs. Enterprise Trans. Co., 164 F. 95, and Youtsey vs. Hoffman, 108 F. 693, were rendered prior to the passage of the rule. It would be of great convenience if independent counterclaims [fol. 86] at law might also be adjudicated in the same proceeding, but the Seventh Amendment stands in the way. American Mills Co. vs. American Surety Co., 260 U. S. 360.

The suggestion that this form of procedure would be unfair to the claimant, because it would require him to meet a counterclaim in a jurisdiction not of his choice, should not prevail. A suitor is always compelled to bring a suit in the court which has jurisdiction over the defendant, and in many instances, there is only one court available for the purpose. His choice of courts may be more restricted when his claim must be filed in a receivership proceeding, but the importance of winding up the affairs of an insolvent corporation, under the supervision of a single court, is so great that this result cannot be avoided. Indeed, in cases of receivership, there is an added reason to that which led the Supreme Court to promulgate Equity Rule No. 30. When an estate is being wound up by a receiver under the supervision of a court of equity, there is more involved than the right of any claimant; and controversies between the receiver and the claimants should be adjudicated expeditiously, so that the estate may be speedily liquidated and all the creditors may receive their proportionate shares.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3737

A. S. ALEXANDER, H. D. RUMMEL, and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Appellants,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and Hecla Coal and Coke Company, a Corporation, Appellees

DECREE—Filed and Entered January 23, 1935

[fol. 87] This cause came on to be heard on the transcript of the record from the District Court of the United States

for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, modified as set forth in the opinion of the Court filed herein; that this cause be, and the same is hereby, remanded to the District Court of the United States for the Southern District of West Virginia, at Charleston, for further proceedings in accordance with the opinion of this Court; and that the costs on this appeal be divided equally between the parties.

January 23, 1935.

Elliott Northcott, U. S. Circuit Judge.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION OF APPELLANTS FOR REHEARING AND FOR ORDER STAYING MANDATE

Presented February 19, 1935

Your petitioners, A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, the Appellants in the above-entitled case, for the reasons assigned in their petition at No. 3736 of your Honorable Court, pray that a rehearing may be allowed in this appeal and that the mandate [fol. 88] be stayed pending the disposition of this petition.

Edwin W. Smith, Arthur S. Dayton, E. C. Higbee, Wm. M. Robinson, Counsel for Petitioners.

We hereby certify that the above petition for a rehearing is presented in good faith and not for the purpose of delay, and further, that in our opinion the petition is well founded and the petitioners are entitled to a rehearing.

Edwin W. Smith, Arthur S. Dayton, E. C. Higbee, Wm. M. Robinson, Counsel for Petitioners.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed February 27, 1935

Upon the petition of the Appellants, by Edwin W. Smith, Arthur S. Dayton, E. C. Higbee and Wm. M. Robinson,

their counsel, and it appearing to the Court that the Appellants have presented a petition for a rehearing in this cause,

It is ordered that the mandate of this Court in the above-entitled cause be, and the same is hereby, stayed pending the action of the Court upon the said petition of the Appellants for a rehearing.

February 27, 1935.

John J. Parker, Senior Circuit Judge.

[fol. 89] In United States Circuit Court of Appeals, Fourth Circuit

No. 3737

[Title omitted]

Order Denying Rehearing—Filed and Entered March 2, 1935

This court having at its January term, 1935, rendered its decision modifying the order of the said District Court appealed from in this cause, and the appellants having on February 19, 1935, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

It is now here ordered by this court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days from this date.

March 2, 1935.

John J. Parker, Senior Circuit Judge.

March 5, 1935, petition of appellants for a stay of mandate pending application in the Supreme Court for a writ of certiorari is filed.

[fol. 90] In United States Circuit Court of Appeals

Order Staying Mandate Pending Application for Certiorari—Filed March 6, 1935

Upon the application of the Appellants, by their counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above cause be, and the same is hereby, stayed pending the application of the Appellants in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this Court or the Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

March 6, 1935.

John J. Parker, Senior Circuit Judge.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 91] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 6, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,460. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 16. A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers, etc., Petitioners, vs. J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, et al. Petition for a writ of certiorari and exhibit thereto. Filed April 1, 1935. File No. 16, O. T., 1935.

FILE COPY

Office Supreme Court, U.S.
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APR 1 1935
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. [redacted]15

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

EDWIN W. SMITH,
ARTHUR S. DAYTON,
E. C. HIGBEE,
WM. M. ROBINSON,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. .....

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation,
Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

May it please the Court:

The petition of A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

(a)

Statement of Facts

By a decree affirmed by the Circuit Court of Appeals for the Fourth Circuit, (64 Fed. 2nd, 817; certiorari denied, 290 U. S. 678, 78 L. Ed. 86), the District Court directed that the business and affairs of Tower Hill Connellsville Coke Company of West Virginia (hereinafter called "Tower Hill") be wound up and its assets distributed among its creditors and stockholders according to their respective rights, and appointing Receivers (Petitioners) for that purpose.

After the coming down of the mandate, the District Court, on December 12, 1933, referred the cause to a Special Master (R., p. 1), "to take, state and report an account and report to the Court" all the debts, obligations and claims against Tower Hill and the nature, amount and respective priorities thereof; the owners of its preferred stock and common stock, and "such other matters as any party in interest may require, the same being pertinent, or such other matters as said Master himself may deem pertinent, whether so required or not."

At a hearing before the Master held January 30, 1934, after due notice, the Respondents, who are hereinafter referred to as "Hillman", "Sheets", "Watson", "Hillman Company" and "Hecla", respectively, severally appeared and made proof of certain claims. Each of them is a non-resident of the Southern District of West Virginia. Hecla's claim is as a holder of preferred and common stock of Tower Hill (R., p. 4); Hillman's is for salary (R., p. 44); Watson's for attorney's fees and salary (R., p. 6); and Hillman Company's for a balance of

operating expenses and rentals under a pool arrangement (R., p. 11). Hillman and Sheets claim as sureties on the supersedeas bond upon a former appeal (R., p. 15).

Thereafter Petitioners, on February 19, 1934, tendered for filing an Ancillary Bill (R., p. 46), averring that Respondents had severally appeared; that they were each indebted to Tower Hill in large sums of money by reason of certain facts therein set out in detail, and praying that they be required to account and pay what upon such accounting appeared to be justly due and owing to Tower Hill. The matters complained of are cognizable in a court in equity. They all relate to the fraudulent mismanagement of the business and affairs of Tower Hill by Hillman, Sheets and Watson, who were its officers and directors, and in which the other Respondents participated or from which they benefited.

On presentation of the Ancillary Bill, the Court entered a decree ordering it to be filed, and directing that "for convenience the Clerk be, and hereby he is directed to give it a separate number but that it and all proceedings pursuant thereto shall be ancillary to this cause" (R., p. 22). The order prescribed how notice should be given to each Respondent and when he or it should plead (R., p. 22).

Conformably to said order, the Ancillary Bill was filed and assigned a separate number, 3370, (R., p. 46) and the prescribed notice given (R., pp. 66, 67).

March 19, 1934, Respondents filed two motions denying the jurisdiction of the Court to entertain the Ancillary Bill, one at No. 1434 (this case) and the other at No. 3370, the number assigned to the Ancillary Bill. The motion in this case is entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of Said Order and of the Bill of Complaint Therein Mentioned", whereby Respondents moved "to

quash the service of the said order and of the Ancillary Bill of Complaint therein mentioned and filed at No. 3370 in Equity of this Court", (R., p. 23). The other, filed at No. 3370, is entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction", whereby Respondents moved "to quash the service of a copy of the order entered by this court in the case of Piedmont Coal Company and others against Tower Hill Connellsville Coke Company of West Virginia, No. 1434 in Equity, and a copy of the Bill of Complaint filed at the above Number in Equity and therein designated as 'Ancillary Bill of Complaint' and to dismiss said Bill for want of jurisdiction" (R., p. 69).

Thereafter, in June, 1934, the District Court handed down a memorandum decision (R., p. 26), and on July 30, 1934, entered its decree in this case (R., p. 25), making the memorandum decision a part of the Record, sustaining Respondents' motion and dismissing the Ancillary Bill for want of jurisdiction over the persons of Respondents. On the same day the Court entered a substantially similar decree at No. 3370 (R., p. 70).

From each of these decrees Respondents appealed, the one being No. 3736 in the Circuit Court of Appeals, and the other No. 3737. The former is from the decree in this case and the latter from the decree at No. 3370.

January 22, 1935, the Circuit Court of Appeals, in an opinion by Northcott, J. (R., p. 76), Soper, J. dissenting (R., p. 86), entered a decree in each of the appeals, modifying the decree by directing that the Ancillary Bill be retained for certain purposes, and that the pleadings be amended in certain respects, and otherwise affirming it.

A petition for reargument was presented in due season, which on March 2, 1935 the Circuit Court of Appeals denied (R., p. 97).

(b)

History of Case in Lower Court

As already stated, there was a reference to a Special Master to ascertain the creditors and stockholders of Tower Hill and their respective rights and priorities.

Respondents appeared and claimed participation in the res in possession of the Court—four of them as creditors and the fifth as a stockholder. By the Ancillary Bill, Petitioners (Receivers), on behalf of all Tower Hill's creditors and stockholders, asserted equitable counterclaims against Respondents and sought to have the Court adjudicate not only Tower Hill's liability to Respondents but their liability to Tower Hill. The District Court held that because Respondents were not subject to its process in a plenary suit, its jurisdiction was limited to Respondents' claims against the res and that it had no jurisdiction to grant affirmative relief against Respondents upon the counterclaims. It dismissed the Ancillary Bill.

The Circuit Court of Appeals affirmed the District Court in holding want of jurisdiction to grant affirmative relief against Respondents upon the counterclaims. In modifying the decree, the Court of Appeals remanded the case "to the end that the court below may give consideration to the question of staying action on the claims pending the adjudication of the counterclaims in a court of competent jurisdiction, and that it may consider any matter set up in the bill which may appropriately be considered as matter of defense against the claims filed". It further directed "that new pleadings be filed in lieu of the ancillary bill, setting up as against each claim filed with the receivers any purely defensive matter which the receivers may desire to assert, together with any matter which would justify the court in staying action on the claims pending the ad-

judication of any counterclaim or counterclaims in a court of competent jurisdiction" (R., p. 85).

(c)

Question Presented

When a claimant appears before a master in a federal receivership proceeding and proves a claim against the receivership res, does he submit himself to the jurisdiction of the receivership court for the adjudication of his liability to the res, when the counterclaim asserted against him by the receiver is of a nature cognizable in equity and its adjudication is essential to a final disposition of the receivership proceeding?

Is not the adjudication of the counterclaim against the claimant and the determination of the whole controversy within the purpose and intendment of Equity Rule 30?

II.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The question thus presented has never been decided by this Court. As it affects materially the prompt and orderly administration of equity receivership estates and involves the application of Equity Rule 30, it is an important question of federal law which should be settled by this Court.

Wherefore, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and

all proceedings in this case, numbered and entitled on its Docket No. 3736, A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, Appellants, v. J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation, Appellees, and that said decree of the Circuit Court of Appeals for the Fourth Circuit may be reversed, and that your Petitioners may have such other and further relief in the premises as to your Honorable Court may seem meet and just.

And your Petitioners will ever pray.

EDWIN W. SMITH,

ARTHUR S. DAYTON,

E. C. HIGBEE,

WM. M. ROBINSON.

Counsel for Petitioners.

Dated: April ...., 1935.

Pittsburgh, Pa.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinions Below

The opinion of the District Court (McClintic, J.) was made part of the Record (R., p. 26) July 30, 1934. It has not been reported.

The opinion of the Circuit Court of Appeals (Judges Parker, Northcott and Soper) was written by Judge Northcott and was filed January 22, 1935 (R., p. 76). Judge Soper filed a dissenting opinion (R., p. 86). These opinions are as yet unreported.

II.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347). The decree of the Circuit Court of Appeals was entered January 23, 1935 (R., p. 88). A motion for a rehearing was denied March 2, 1935 (R., p. 97).

III.

Statement of the Case

The material facts, with appropriate page references to the printed Record, are stated in the petition, supra, pages 2 to 5 inclusive. A summary of the argument appears in the index. All the errors assigned in the Court below are intended here to be urged (R., p. 28).

IV.

ARGUMENT

(a) *Jurisdiction of Subject-Matter*

A District Court administering a receivership estate has absolute authority to adjudicate all claims respecting the res, not only those against the res but those on behalf of the res against others. The Circuit Court of Appeals so held.

This proposition is settled by—

White v. Ewing, 159 U. S. 36; 40 L. Ed. 67;
Peck v. Elliott, 79 Fed. 10.

The Circuit Court of Appeals so held (R., P. 80) and Respondents so concede. In their brief in that Court they said:

> "Appellees do not question the jurisdiction of the Court below to maintain an action by the Receivers to recover moneys due them in said Court in an action wherein the defendants are residents of the said district."

(b) *Jurisdiction of Persons of Respondents*

When Respondents appeared before the Special Master and asserted claims against the receivership res, the Court, in the receivership proceeding, acquired jurisdiction to grant affirmative relief against them upon equitable counterclaims asserted by the receivers. The Circuit Court of Appeals erred in not so holding.

(1) EQUITY RULE 30.

The second paragraph of this Rule is—

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross-claims."

In *American Mills Co. v. American Surety Co. of New York,* 260 U. S. 360; 67 L. Ed. 306, this Court, by Mr. Chief Justice Taft, said (364, 309):

"The new Equity Rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence, and by uniting in one action as many issues as could conveniently be disposed of. • • • The counterclaim referred to in the first part of the paragraph (Equity Rule 30) must therefore be an equitable counterclaim—one which, like the set-off or counterclaim referred to in the next clause, could be made the subject of an independent bill in equity. The counterclaim and the set-off and counterclaim in the two clauses are in pari materia except that the first grows out of the subject-matter of the bill and the other does not. That which grows out of the subject-matter of the bill must be set up in the interest of an end of litigation. That which does not may be set up, if the defendant wishes, in one proceeding in equity quickly to settle all equitable issues capable of trial between them in such a proceeding, even though they are not re-

lated. *Buffalo Specialty Co. v. Van Cleef*, 217 Fed. 91. The formality of cross bills is not required, and the rule goes as far as possible to facilitate the prompt disposition of equitable controversies between the same litigants. The rule should be liberally construed to carry out its evident purpose of shortening litigation, but the limitation of counterclaims to those which are equitable is imperative."

In *Buffalo Specialty Co. v. Van Cleef*, 217 Fed. 91, cited by Mr. Chief Justice Taft, it is said (93):

"It will be seen that Rule 30 requires defendant to set up any counterclaim which arises out of the transaction forming the subject-matter of the bill, but allows without requiring him to set up any equitable counterclaim or set-off which might be the subject of an independent suit by defendant against plaintiff. The language is perfectly clear: If defendant has an independent cause of action in equity against plaintiff, he may counterclaim it. If any corroboration of this view were needed, it is found in the fact that the Supreme Court, in adopting the rule, omitted the last clause of the English rule which restricts counterclaims to those which can be conveniently disposed of and those which ought to be allowed. Not only was any set-off or counterclaim which may be the subject of an independent suit included, but an exception was rejected. Moreover, it has always been held by the English courts that independent causes of action, wholly unconnected with the claim of the plaintiff, may be counterclaimed."

Since the Respondents, by assertion of their claims in the receivership proceeding, are seeking affirmative relief against the res, their demands, without regard to the form in which they are cast, are in essence bills in

equity against Tower Hill, and the Ancillary Bill, notwithstanding its form, is likewise in essence an answer setting up counterclaims, which, although they might have been the basis of an independent bill, are still within the express terms of Equity Rule 30.

If "the new Equity Rules were intended to simplify equity pleading and practice" and Rule 30 "goes as far as possible to facilitate the prompt disposition of equitable controversies between the same litigants," Petitioners respectfully submit that the very purpose of the Rule requires the District Court to adjudicate not only Respondents' right to participate in the res but their liability to account to the res, and to settle in one proceeding all controversies between Petitioners and Respondents respecting the res.

This is in harmony with an established equity doctrine thus stated by Mr. Chief Justice Taft, speaking for this Court, in *Hartford Accident and Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207; 71 L. Ed. 612 (217, 616):

> "Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide the whole issues and award complete relief even where the rights of parties are strictly legal and the final remedy granted is of the kind which might be conferred by a court of law."

Since all counterclaims asserted against Respondents in the Ancillary Bill are of a character cognizable in equity, no right of trial by jury is involved. This fact seems to have been overlooked by the Circuit Court of Appeals. In its opinion, Judge Northcott says (R., p. 84):

> "The claimants, by filing their claims in a court of equity, waive their right of jury trial with re-

spect to the claims filed, but they do not waive such right with respect to independent claims against them which the receivers may seek to assert by way of counterclaim. It is well settled that a counterclaim involving a cause of action at law cannot be asserted in a suit in equity, because of the right of the party against whom it is asserted to a jury trial under the Seventh Amendment to the Constitution. *American Mills Co. v. American Surety Co.*, 260 U. S. 360; *Sinclair Refining Co. v. Midland Oil Co.*, (C. C. A., 4th), 55 Fed. (2d) 42, 47."

What is there said appears to be, in large measure, the ratio decidendi, but is without application to this case. Every counterclaim asserted against Respondents is clearly cognizable in equity and could have been the basis of an independent action in equity by the Receivers against Respondents, or by Tower Hill itself had there been no receivership.

The application of Equity Rule 30 to this case is well stated by Judge Soper in his dissenting opinion (R., p. 87):

"Furthermore, there seems to be no important reason why Equity Rule 30, promulgated November 4, 1912, should not be applied to the situation which arises when a receiver has a set-off or counterclaim in equity, growing out of an independent transaction, against a claimant. This rule provides in substance that the defendant in his answer to a suit in equity may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim shall have the same effect as a cross suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the counterclaim. By

the passage of this rule, the Supreme Court, in order to make it possible to put an end to all controversies between the same parties in a single suit, changed the former practice which confined set-offs and counterclaims to those which arose out of the transaction that formed the basis of the original suit. Since the filing of a disputed claim against a receiver in an equity proceeding is in one aspect a separate suit, it falls within the scope of Equity Rule No. 30, and the receiver should have the same right to set-off or counterclaim as would have been accorded to the corporation before the receiver was appointed."

(2) RESPONDENTS SUBMITTED TO THE JURISDICTION

Submission to the jurisdiction of a court may result from some act intended to have that effect, such as a praecipe for appearance, or, on the other hand, may be by some step taken in the course of a cause which in law has that effect, although it may not have been so intended. This is aptly expressed by Mr. Chief Justice Fuller in *Wabash Western Ry. Co. v. Brow*, 164 U. S. 271; 41 L. Ed. 431 (278; 434):

> "An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant even when not in fact intended."

Although in particular cases there may be other governing criteria, an inerrant test of what constitutes a general appearance conferring jurisdiction over the person is whether he has become an actor in the cause.

This principle is clearly established by *Merchants Heat & Light Co. v. James B. Clow & Sons*, 204 U. S. 286;

51 L. Ed. 488. Although different in its facts, that case is identical in principle with the one at bar. The suit was in the Circuit Court of the United States for the Northern District of Illinois by a citizen of that State against a citizen of Indiana. The defendant moved to set aside the service, the ruling was adverse, and it excepted. It then answered and set up a counterclaim by way of recoupment and sought to recover a balance. Judgment went against it and it appealed to this Court, assigning as error the denial of its motion to set aside the service. This Court declined to express an opinion upon the merits of the motion "because it is not necessary for the decision of the case, in view of the submission to the jurisdiction which the facts disclose." However, assuming that defendant lost no rights by pleading to the merits, as required, after saving its rights, the Court held that "by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the Court in the same action, and, by invoking, submitted to it." Mr. Justice Holmes said (290; 490):

> "There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits,"

and again (290; 490):

> "* * * there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and, to the extent of his claim, a cross plaintiff in the suit."

That Respondents became actors in the receivership proceeding is beyond question. Pursuant to the order of reference directed for the purpose of determining the parties entitled to distribution of the res, Re-

spondents, at a hearing regularly held by the Special Master as part of the proceedings in this cause, presented formal proofs of claim, procured them to be made a part of the Record and offered evidence in support of them. Thereby they came into the cause to gain the benefit and avail themselves of the advantages of the decree creating the fund in which they seek to share. The course they pursued is the exact legal equivalent of an action against Tower Hill had there been no receivership. In such contingency, they would have exposed themselves to the risk of counterclaim and set-off. Having presented their claims or, in legal effect, instituted their suits, the Ancillary Bill is but a method of bringing the counterclaims of Tower Hill, now represented by the Receivers, on the record.

The Circuit Court of Appeals does not controvert the proposition that Respondents became actors in the receivership cause and by their claims sought affirmative relief against the assets of Tower Hill, but it relieves each Respondent from liability to counterclaim because "he is not in a court of his own choosing but in a court selected by others." Judge Northcott says (R., p. 83):

> "One filing a claim with a receiver, however, is in a very different position from one who has filed a bill in equity. He is not in a court of his own choosing, but in a court selected by others, which has taken into its possession the only property from which he can obtain payment of his claim. The complainant who files a bill in equity, and thus subjects himself to equitable counterclaims of the defendant, has had the option of going into either the state or federal courts and of suing in any district in which jurisdiction of the defendant can be obtained. The claimant who files claim with a re-

ceiver, on the other hand, has had no option whatever."

Judge Northcott cites *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430; 77 L. Ed. 408, and quotes from the opinion of Mr. Justice Butler:

> "The setting up of a counterclaim against one already in a court of his own choosing is very different, in respect to venue, from hailing him into that court."

The Court was there considering the waiver of venue and the statement is to bring in contrast the difference on that point between a party already in court on his own suit and one brought in by process.

In that case, New York corporations brought suit in a District Court of Ohio and defendants set up a counterclaim praying an injunction and accounting. Plaintiffs moved to dismiss the counterclaim for want of jurisdiction, alleging that under the relevant Sections of the Judicial Code they were not liable to suit in that District. The District Court sustained the motion, the Circuit Court of Appeals reversed and this Court affirmed. The decision was that plaintiffs having brought their suit in the particular district, were liable to counterclaim in that action notwithstanding that they were not amenable to the process of that Court. The phrase "a court of his own choosing", as thus used, is without the remotest application to any question here involved, and to the extent that the doctrine of that decision has any application to the question here presented, it is favorable to Petitioners.

The Circuit Court of Appeals seems to concede that had there been no receivership, Tower Hill could have maintained the counterclaims now asserted by the Receivers because, perchance, Tower Hill may have been

subject to the process of more than one court, but denies the Receivers' counterclaims because by operation of law claims against Tower Hill's assets can be asserted in only one court. Petitioners respectfully submit that there is no reasonable ground for such distinction.

The law vesting the District Court with jurisdiction to administer the res and to determine claims against it is what required Respondents to come into that tribunal. That law deprived them of no right. It left them perfectly free to go in or stay out, just as before the receivership they were free to sue or not to sue as they chose. The only effect of the receivership was to restrict the tribunals in which they otherwise might have asserted their claims to the particular one having custody of the res.

Had there been no receivership, they could have sued in any court having jurisdiction—federal or state—but they would have run the risk of counterclaim and set-off exactly as is set up in the Ancillary Bill, and to hold, as the Circuit Court of Appeals did, that the result of the receivership is to afford them an immunity they otherwise would not have had, is to defeat the very purpose of the law vesting a court having possession of a res with power to determine the liability of third persons to it.

When a party institutes a suit, he considers what claims, whether by recoupment or recovery of a balance, may be made against him, and of that he runs the risk. He has no vested right to sue or be sued in a particular court. All that he is entitled to is due process of law and the equal protection of the law, and for the District Court to determine Respondents' liability to the res as well as the liability of the res to them denies them neither.

Whether the District Court should adjudicate Tower Hill's claim against Respondents was a matter of choice with them. They were not obliged to invoke its jurisdiction and Petitioners were powerless to compel them to do so.

Just as does any suitor, they decided to proceed and thereby subjected themselves to the dangers incident to such a course, in this instance, the hazard of having it judicially determined that instead of Tower Hill's owing them they were actually indebted to it. They knew the worth of their demands and the strength of the counter charges against them, and their choice to move to enforce the former is but an election to pit them against the latter.

The Circuit Court of Appeals did not base its decision in any way on the question of venue, which Respondents in that Court said was, in the final analysis, the only issue involved. It is, therefore, not necessary to discuss that point, but it may be observed that under the facts any question of venue is waived.

General Electric Co. v. Marvel Rare Metals Co., 287 U. S. 430; 77 L. Ed. 408;
Thames & Mersey Marine Insurance Co. v. United States, 237 U. S. 19; 59 L. Ed. 821;
Burnrite Coal Briquette Co. v. Riggs, 274 U. S. 208; 71 L. Ed. 1002.

V.

Conclusion.

It is, therefore, respectfully submitted that this case calls for the exercise by this Court of its supervisory powers in order that the novel and important question of federal jurisdiction and procedure therein may be decided by this Court, and that to such end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Fourth Circuit and finally reverse it.

EDWIN W. SMITH,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. ... 816

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 831.

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

May it please the Court:

The petition of A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, respectfully shows to this Honorable Court:

This case is between the same parties, involves exactly the same facts and presents precisely the same question as the case at No. 831 October Term, 1934, of this Court, in which Petitioners have also filed a petition for certiorari.

In the District Court, at No. 1434 in Equity, wherein Piedmont Coal Company et al. are Plaintiffs and Tower Hill Connellsville Coke Company of West Virginia (hereinafter called "Tower Hill") is Defendant, a decree had been entered winding up the business and affairs of Tower Hill and directing the distribution of its assets among its creditors and stockholders and appointing Receivers (Petitioners) for that purpose. That decree was affirmed (64 Fed. (2nd) 817; certiorari denied, 290 U. S. 678, 78 L. Ed. 86). That cause was referred to in the District Court and the Circuit Court of Appeals as the "Primary Cause."

A Special Master having been appointed in the Primary Cause to ascertain Tower Hill's creditors and stockholders and their respective rights and priorities, (R., p. 44) Respondents appeared before the Special Master, filed formal proofs of claim and introduced evidence in support thereof (R., pp. 47-63; 41).

Petitioners, as Receivers, tendered in the Primary Cause an Ancillary Bill setting up equitable counterclaims against Respondents, and by a decree in the Primary Cause the District Court ordered the Ancillary Bill to be filed and directed that for convenience it be given a separate number but that it and all proceedings pursuant thereto should be ancillary to the Primary Cause (R., p. 64). Accordingly, the Ancillary Bill was assigned No. 3370 in Equity (R., p. 2) and has been known in that Court and in the Circuit Court of Appeals as the "Ancillary Cause."

Motions to dismiss the Ancillary Bill having been filed by Respondents in the Primary Cause (R., p. 66) as well as in the Ancillary Cause (R., p. 24), the District Court sustained the motions and entered substantially the same decree at each number (R., pp. 68, 26). From each of these decrees Petitioners appealed, the appeal

in the Primary Cause being No. 3736 in the Circuit Court of Appeals and the appeal in the Ancillary Cause No. 3737. The appeals were argued together and were disposed of in one opinion (R., p. 74) and by one decree (R., p. 86).

The petition at No. 831. October Term, 1934, is for a certiorari to review the decree in the Primary Cause (No. 3736) and this petition is for a certiorari to review the same decree in the Ancillary Cause (No. 3737).

As the facts involved, the question presented and the reasons for the allowance of the writ are exactly the same as those set forth in the petition at No. 831. October Term, 1934, (the Primary Cause), Petitioners deem that the Court will not be assisted but, on the contrary, burdened by a repetition here of what is said in that petition and the supporting brief, and they respectfully request that what is there said may be considered and taken as part hereof.

Wherefore, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case, numbered and entitled on its Docket No. 3737, A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, Appellants, v. J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation, Appellees, and that said decree of the Circuit Court of Appeals for the Fourth Circuit may be reversed, and

that your Petitioners may have such other and further relief in the premises as to your Honorable Court may seem meet and just.

And your Petitioners will ever pray.

EDWIN W. SMITH,

ARTHUR S. DAYTON,

E. C. HIGBEE,

WM. M. ROBINSON.

Counsel for Petitioners.

Dated: April ...., 1935.
Pittsburgh, Pa.

PETITIONER'S BRIEF

FILE COPY

SEP 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

NOS. 15 AND 16.

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation,

Petitioners,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation,

Respondents.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

NOS. 15 AND 16.

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation,

Petitioners,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation,

Respondents.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR PETITIONERS.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 75 Fed. (2d) 451. The separate opinion of Judge Soper of that Court is reported in 75 Fed. (2d) 456. These opinions will be found on pages 66 and 74, respectively, of the Record.

The opinion of the District Court, styled "Memorandum Decision," is not reported but will be found at page 23 of the Record.

II.

JURISDICTION.

(1) Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended; United States Code Annotated, Title 28, Section 347.

(2) The decree of the Circuit Court of Appeals was entered January 23, 1935 (R. 77). The motion for rehearing was presented February 19, 1935 (R. 78), and was denied without opinion March 2, 1935 (R. 85). A petition for certiorari was filed April 1, 1935 (R. 86) and the order allowing it was entered May 6, 1935 (R. 86).

III.

QUESTIONS PRESENTED.

The questions presented are:

(1) When a claimant appears before a master in a federal receivership proceeding and proves a claim to share in the distribution of the receivership *res,* does he submit himself to the jurisdiction of the receivership court for the adjudication of his liability to the *res,* when the counterclaim asserted against him by the receiver is of a nature cognizable in equity and its adjudication is essential to a final disposition of the receivership proceeding?

(2) Is not the adjudication of the counterclaim against the claimant and the determination of the whole controversy within the purpose and intendment of Equity Rule 30?

IV.

STATEMENT OF THE CASE.

There were two appeals in the Circuit Court of Appeals, No. 3736 known as the "Primary Cause", and No. 3737 as the "Ancillary Cause". The Primary Cause is in this Court on certiorari at No. 15 October Term, 1935, and the Ancillary Cause at No. 16 of that Term. Precisely the same question is involved in each appeal and the parties to each are the same. In the Circuit Court of Appeals the Record was printed separately for each appeal, and that course has been adopted here. The printed Record at No. 15 contains the same matter appearing in the Record at No. 16, although differently arranged. This brief covers the appeal at each of the numbers and the references herein to the Record are to the printed Record at No. 15. The relation of the Primary Cause and the Ancillary Cause to each other and the reason for the two appeals will appear as the Statement of the Case develops.

The Primary Cause, wherein Piedmont Coal Company and others are Plaintiffs and Tower Hill Connellsville Coke Company of West Virginia (hereinafter called "Tower Hill") is Defendant, is a suit in equity in the District Court of the United States for the Southern District of West Virginia, wherein the District Court entered its decree directing that the business and affairs of Tower Hill be wound up, its assets distributed among its creditors and stockholders according to their respective rights, and appointing Receivers (Petitioners) for that purpose. That decree was affirmed by the Circuit Court of Appeals for the Fourth Circuit (64 Fed. (2d) 817) and certiorari was denied (290 U. S. 678, 78 L. Ed. 86).

After the denial of the certiorari and the coming down of the mandate, the District Court, on December 12, 1933, referred the cause to a Special Master (R. 1) "to take, state and report an account and report to the Court" all the debts, obligations and claims against Tower Hill and the nature, amount and respective priorities thereof, the owners of the preferred stock and common stock of Tower Hill, and "such other matters as any party in interest may require, the same being pertinent, or such other matters as said Master himself may deem pertinent, whether so required or not."

At a hearing before the Master held January 30, 1934, after due notice, the Respondents, who are hereinafter referred to as "Hillman", "Sheets", "Watson", "Hillman Company" and "Hecla", respectively, severally appeared and made proof of their claims. Each of them is a non-resident of the Southern District of West Virginia.

Hecla's claim is as a holder of preferred and common stock of Tower Hill (R. 4, 36); Hillman's is for salary as President of Tower Hill (R. 37); Watson's is for attorney's fees and salary as Secretary of Tower Hill (R. 6, 37), and Hillman Company's is for a balance of operating expenses and rentals under a pool arrangement affecting Tower Hill (R. 10, 37). Hillman and Sheets claim as sureties on a supersedeas bond upon a former appeal (R. 13, 37).

Thereafter Petitioners, on February 19, 1934, tendered for filing an Ancillary Bill (R. 39) averring that Respondents had severally appeared and that they were each liable to Tower Hill in large sums of money by reason of certain facts therein set out in detail, and praying that they be required to account for and pay what upon such accounting appeared to be justly due and owing to Tower Hill. Each of the matters com-

plained of in the Ancillary Bill is cognizable in a court in equity. They all relate to the fraudulent mismanagement of the business and affairs of Tower Hill by Hillman, Sheets and Watson, who were its officers and directors, and in some of which the other Respondents participated or from which they benefited.

On presentation of the Ancillary Bill, the Court entered a decree in the Primary Cause (R. 19) ordering it to be filed and directing that "for convenience the Clerk be, and hereby he is directed to give it a separate number but that it and all proceedings pursuant thereto shall be ancillary to this cause". The order prescribed what notice should be given to each Respondent and when he or it should plead. Conformably to that order the Ancillary Bill was filed the same day and was assigned a separate number, 3370 (R. 39), and the prescribed notice was given (R. 56, 57).

March 19, 1934, Respondents filed two separate motions challenging the jurisdiction of the District Court respecting the Ancillary Bill. The one filed in the Primary Cause (R. 20) is entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of Said Order and of the Bill of Complaint Therein Mentioned", whereby Respondents moved "to quash the service of the said order and of the Ancillary Bill of Complaint therein mentioned and filed at No. 3370 in Equity of this Court." Respondents' other motion, filed in the Ancillary Cause (R. 58), is entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction", whereby they moved "to quash the service of a copy of the order entered by this court in the case of Piedmont Coal Company and others against Tower Hill Connellsville Coke Company of West Virginia, No. 1434 in Equity, and a copy of the Bill of Complaint filed at the above Number in Equity and therein

designated as 'Ancillary Bill of Complaint' and to dismiss said Bill for want of jurisdiction."

Thereafter, in June 1934, the District Court handed down a Memorandum Decision (R. 23) and July 30, 1934, entered its decree in the Primary Cause (R. 22) making the Memorandum Decision a part of the Record, sustaining Respondents' motion and dismissing the Ancillary Bill for want of jurisdiction over the persons of Respondents. On the same day the Court entered a substantially similar decree in the Ancillary Cause (R. 60).

From each of these decrees Petitioners appealed, the one being No. 3736 in the Circuit Court of Appeals and the other No. 3737. The former was from the decree in the Primary Cause (No. 1434 in the District Court) and the latter was from the decree in the Ancillary Cause (No. 3370 in the District Court). The two appeals were argued in the Circuit Court of Appeals as one and were so considered by that Court.

January 22, 1935, the Circuit Court of Appeals, in an opinion by Judge Northcott (75 Fed. (2d) 451; R. 66), entered the same decree in each of the appeals, modifying the decrees of the District Court by directing that the Ancillary Bill be retained for certain purposes and that the pleadings be amended in certain respects, and otherwise affirming the District Court. The decree of the Circuit Court of Appeals in the Primary Cause will be found at page 77 of the Record at No. 15 October Term, 1935, and its decree in the Ancillary Cause will be found at page 74 of the Record at No. 16 October Term, 1935. Judge Soper, of the Circuit Court of Appeals, filed a separate opinion dissenting from the decision of the majority (75 Fed. (2d) 456; R. 74).

In view of the fact that Respondents made two motions, one in the Primary Cause and one in the Ancil-

lary Cause, and the District Court sustained them by separate decrees, Petitioners (Receivers) deemed it expedient to take two appeals, although the question raised by each was exactly the same and was presented by precisely the same Record.

The sole question is, as stated by the District Court, "has this court, under the circumstances herein set out, jurisdiction of the defendants (Respondents)" (R. 24). Regarding the circumstances to which the Court refers, the District Judge, in his Memorandum Decision, said (R. 23):

> "The claim of the plaintiffs is that by reason of the appearance of these defendants in this suit before the Master to whom this suit had been rendered (referred), and by reason of the claims of these defendants filed before the Master, claiming certain sums of money in each case to be due each one thereof, each one of them became a party to this suit for all purposes, and that by reason thereof, the receivers had a right to file this ancillary bill in this suit to recover the sums of money claimed.
>
> "For the purpose of information, this court entered an order on the 19th day of February, 1934, requiring the defendants to appear by a certain date and make any motions they might desire, and directing that a true copy of the order and of the bill be delivered to the defendants.
>
> "This order, and the things to be done thereunder, were then or now in no way intended to be a service of process upon these defendants. The whole theory of the plaintiffs was and is that these defendants were already parties to this suit, and did not require any service of process upon them, other than to give them notice of the filing of the bill.

"By motions filed on the 19th day of March, 1934, the defendants first moved to quash what they called 'service' upon the defendants, and to dismiss the bill for want of jurisdiction; also moved to vacate the order of court entered on the 19th day of February, 1934, and to quash the service of said order and of the bill of complaint mentioned therein.

"As stated above, there was no pretense that such order was a service of process."

In sustaining Respondents' motions and dismissing the Ancillary Bill, the District Court said (R. 24):

"* * * Under the decisions of the Supreme Court of West Virginia, I am inclined to hold that they (Respondents) are parties for all purposes. However, I find but little, if any, supporting authority from federal courts for that holding.

"I appreciate the fact that if I were to so hold, then the suit would have to proceed to a final conclusion before the question of jurisdiction could be finally decided. Great cost and expense would be incurred. It is to be regretted that a Federal District Judge has no way of certifying a question of this character to the Circuit Court of Appeals.

"I think it right, in this case, however, to enter an order sustaining the motion of the defendants, so that the plaintiffs can appeal therefrom and we can be favored with a final decision on the question whether this court has or has not jurisdiction, as claimed by the plaintiffs, and which is denied by the defendants."

The Circuit Court of Appeals modified and affirmed the decree of the District Court, and directed the Record to be remanded (75 Fed. (2d) 451, 456; R. 73)—

"* * * to the end that the court below may give consideration to the question of staying action on the claims pending the adjudication of the counterclaims in a court of competent jurisdiction, and that it may consider any matter set up in the bill which may appropriately be considered as matter of defense against the claims filed. The court should require, however, that new pleadings be filed in lieu of the ancillary bill, setting up as against each claim filed with the receivers any purely defensive matter which the receivers may desire to assert, together with any matter which would justify the court in staying action on the claims pending the adjudication of any counterclaim or counterclaims in a court of competent jurisdiction."

V.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred—

(1) In not holding that Respondents, by appearing in the receivership cause and proving their claims for participation in the receivership *res*, submitted themselves to the jurisdiction of the District Court in that cause for adjudication of equitable counterclaims.

(2) In not reversing the decrees of the District Court dismissing the Ancillary Bill and in not remanding the Record with directions to reinstate the Ancillary Bill.

(3) In not holding that the District Court had jurisdiction of the persons of Respondents.

(4) In not holding that the District Court had jurisdiction to entertain the Ancillary Bill and proceed to a final adjudication of the entire controversy.

VI.

SUMMARY OF ARGUMENT.

(1) Jurisdiction of the Subject Matter.

A district court administering a receivership estate has authority to adjudicate all claims respecting the *res*, not only those to or against the *res* but those on behalf of the *res* against others. The Circuit Court of Appeals so held.

(2) Jurisdiction of Persons of Respondents.

When Respondents appeared before the Special Master and asserted claims to participate in the distribution of the receivership *res*, the Court in the receivership proceeding acquired jurisdiction to grant affirmative relief against them upon equitable counterclaims asserted by the Receivers. The Circuit Court of Appeals erred in not so holding.

(a) Respondents Submitted to the Jurisdiction of the Court.

Respondents, by appearing before the Special Master and proving their claims to participate in the receivership *res*, became actors in the cause and thereby submitted to the jurisdiction of the Court.

(b) Equity Rule 30.

It is the spirit and intendment of Equity Rule 30 that when affirmative relief is sought in an equity proceeding, whether by bill or other appropriate pleading, the claimant submits himself to the jurisdiction of the Court for the adjudication of equitable counterclaims, irrespective of the transactions out of which such coun-

terclaims arose, to the end that the whole of the controversy may be determined in a single proceeding.

(c) APPLICATION OF THESE PRINCIPLES.

(3) The Claims Against Respondents.

The counterclaims against Respondents are cognizable in equity and their adjudication by a court in equity does not deprive Respondents of any right to trial by jury.

(4) The Opinion of the Circuit Court of Appeals.

It limits the consequences of the acts of Respondents too narrowly and does not give effect to the spirit and intendment of Equity Rule 30.

VII.

ARGUMENT.

(1) Jurisdiction of the Subject Matter.

A district court administering a receivership estate has authority to adjudicate all claims respecting the *res*, not only those to or against the *res* but those on behalf of the *res* against others.

While this proposition is not here in dispute, and was in effect conceded by Respondents and was affirmed by the Circuit Court of Appeals (75 Fed. (2d) 451, 453; R. 68), it may be helpful to consider the principles underlying the broad powers exercisable by a court in equity in administering and distributing the *res* in a receivership proceeding, because they throw considerable light upon the precise question here involved.

It has been conclusively decided by an unbroken line of federal authority that the appointment of receiv-

ers of a corporation brings into the jurisdiction of the appointing court the entire assets of the corporation and all claims of whatsoever character relating thereto. The jurisdiction of the court is not limited to those assets of which the receivers peaceably obtain possession, but includes assets of the corporation in the possession of others, whether they be tangible property or choses in action, and the arm of the court reaches out to reduce them to possession. In the exercise of this jurisdiction, the power of a federal court is not dependent upon the amount in controversy or the citizenship of the parties. It may proceed by petition, by ancillary bill, or in such other manner as to it may seem appropriate. The only limitation upon its power is that in some way or other it acquire jurisdiction of the persons against whom the power is sought to be exercised. The citation of a few of the leading cases establishing the doctrine and presenting the reasons on which it is founded is all that is required for the present purpose.

White v. Ewing, 159 U. S. 36; 40 L. Ed. 67.

A receiver was appointed for Cardiff Coal & Iron Company, a Tennessee corporation, by the Circuit Court for the Eastern District of that State upon a creditor's bill. The receiver filed a petition in the receivership cause setting forth that a large portion of the company's assets consisted of promissory notes amounting to about $225,000.00, executed by one hundred thirty different persons and for various amounts, many of them less than $2,000.00. Upon this petition the Court directed the receiver to institute suit by proper bill or petition in the receivership cause against all these persons, irrespective of the amount of the claim. This was done and decrees were entered against all the defendants. Appeals were taken to the Circuit Court of Appeals and

that Court certified to this Court for its determination this question (37; 67):

> "Had the circuit court of the United States in a general creditor's suit properly pending therein for the collection, administration, and distribution of the assets of an insolvent corporation, the jurisdiction to hear and determine an ancillary suit instituted in the same cause by its receiver in accordance with its order, against debtors of such corporation, so far as in said suit, the receiver claimed the right to recover from any one debtor a sum not exceeding $2000."

In answering this question in the affirmative and holding that the Circuit Court had jurisdiction in the ancillary proceeding irrespective of the amount in controversy or the citizenship of the parties, this Court, in an opinion by Mr. Justice Brown, said (39; 68):

> "The circuit court obtained jurisdiction over the Cardiff Coal & Iron Company by the filing of the original creditor's bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver; and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the circuit court, regardless either of the citizenship of the parties or of the amount in controversy. (Cases cited)
>
> "Indeed, it was conceded that, where an insolvent corporation is placed in the hands of a receiver of the circuit court, such appointment draws to the jurisdiction of that court the control of its assets, so far as persons having claims to participate in the distribution of such assets are con-

cerned, and that parties must go into that court in order to assert their rights, prove their demands, and receive whatever may be due them, or their share or interest in the estate. But it is insisted that there is a distinction between cases where parties are brought before the court for the purpose of the payment to them of claims they may hold against the estate, and cases where it is sought to recover of them claims which the receiver insists they owe the estate; that the receiver stands in the shoes of the company, and has no higher rights than the corporation, and having sued for less than the jurisdictional amounts, that as to them the cases must be dismissed.

"This position is entirely correct so far as the right of the receiver to recover upon the merits is concerned; but it has no bearing whatever upon the question of the jurisdiction of the court to pass upon such merits. The receiver does not take his authority as an ordinary indorsee of the paper, and subject to the disability to sue in the Federal court, which attaches to such indorsee, but he takes title by operation of law, and as an instrument of the court which appointed him. The cases upon which the appellant relies, of *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42 (36; 66), and *Walter v. Northeastern R. Co.*, 147 U. S. 370 (37; 206), were both original bills over which jurisdiction could only be acquired upon proper allegations of citizenship and amount. In this case, however, the court proceeds upon its own authority to collect the assets of an estate, with the administration of which it is charged; and, if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the

estate of an insolvent corporation over which it has by an original bill obtained jurisdiction."

Peck v. Elliott, 79 Fed. 10,
Circuit Court of Appeals, Sixth Circuit.

Upon a creditor's bill, the United States Circuit Court for the Southern Division of the Eastern District of Tennessee appointed Receivers of the Southern Malleable Iron Company. The object of the bill was to preserve the property as an operating unit, collect its debts, complete certain valuable contracts and sell the property as a whole, including its good will, for the satisfaction of all its debts according to priority of lien. The receivers filed a petition alleging that the president of the corporation was indebted to it upon an unpaid stock subscription. Leave of court was granted to file the petition and to make the president a party defendant. The president filed his answer denying the jurisdiction of the court, its jurisdiction to proceed against him by petition or bill in equity, and his liability as a stockholder. Proof was taken and the petition dismissed. Upon appeal, the decree was reversed with directions to enter a decree against the president for the amount of his unpaid stock subscription. In the opinion of the Circuit Court of Appeals, delivered by Judge Lurton and concurred in by Judges Taft and Sage, upon the question of jurisdiction it is said (11):

"The jurisdiction of the court to entertain this petition of the receivers against the appellee depends upon its jurisdiction in the original case, to which this proceeding was wholly ancillary. This petition is auxiliary to the original suit. It is a petition by the receivers asking the aid of the court to enable them to collect in an asset of the corporation. It was filed by direction of the court under an order made in the principal cause. The jurisdic-

tion of the court in the principal cause is not questioned, and cannot be in this collateral suit. (Cases cited) The fact that the circuit court had possession of all the assets of the Southern Malleable Iron Company, for the purpose of winding up its affairs as an insolvent corporation, is the fact which made it admissible to bring a debtor of that corporation into the court, to the end that his debt might be ascertained and payment coerced. For the purpose of collecting in choses in action, the court might direct its receivers to institute independent suits in that or courts of the state, or cause such debtors to be made defendants in the principal cause, and determine for itself any question which might be involved by the defenses to the claim. Such a proceeding would not involve any question of citizenship, or amount in controversy, nor mode of trial. The complete jurisdiction of the court over the *res*, the property and assets of this corporation, involved its right to bring before it persons having possession of any of those assets, or having claims thereon, or who were indebted to it, and either itself hear and determine all controversies, or refer them to a master or to a jury, as it saw fit. A court of equity is not deprived of jurisdiction simply because a purely legal question becomes collaterally involved. It might, in its discretion, submit such controversy upon issues made to a jury, or dispose of them without doing so. That the liability of appellee was one of a legal character did not operate to defeat the jurisdiction, and bring its proceedings against him to a stand. These questions seem conclusively settled by *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, a case which arose upon a like proceeding in the same court, and in which

certain questions were certified by this court under the court of appeals statute."

Pope v. L. N. A. & C. Ry. Co., 173 U. S. 573; 43 L. Ed. 814, in which Mr. Chief Justice Fuller said (577; 816):

"* * * When an action or suit is commenced by a receiver, appointed by a circuit court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the circuit court as a court of the United States is concerned; and we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested;"

and again (578; 817):

"The suits in which this receiver was appointed were in the nature of creditors' bills alleging an indebtedness due from the Atlantic Company; the insolvency of that company; that certain corporations had in their possession assets of the Atlantic Company; and praying for the appointment of a receiver; the marshaling of assets; the winding up of the Atlantic Company, and the application of its assets to the payment of its debts. The only ground of Federal jurisdiction set up in the bills was diversity of citizenship, and if the decrees therein had been passed on by the circuit court of appeals, the decision of that court would have been final under the statute. And as this suit was in effect merely in collection of alleged assets of the Atlantic Company, it must be regarded as auxiliary, and the same finality attaches to the decree of the circuit court of appeals therein."

(2) Jurisdiction of Persons of Respondents.

(a) RESPONDENTS SUBMITTED TO THE JURISDICTION OF THE COURT.

A court obtains jurisdiction of persons in either of two ways—by the service of process or by submission. The former is not here claimed, and the argument will be confined to the latter.

Submission results from some act intended to accomplish that result, such as a praecipe for appearance, or, on the other hand, may be by some step taken in the course of a cause, which in law has that effect, although it may not have been so intended. The latter is what is here involved.

This is aptly expressed by Mr. Chief Justice Fuller in *Wabash Western Ry. Co. v. Brow,* 164 U. S. 271, 278, 41 L. Ed. 431, 434:

> "An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant even when not in fact intended."

When a party submits himself to the jurisdiction of a court in a particular case, he is bound by every order and decree legitimately entered therein just as effectively as if he were brought in by process regularly issued and served.

Although in particular cases there may be other governing criteria, an inerrant test of what constitutes a general appearance conferring jurisdiction over the person is whether the person has become an actor in the cause.

This principle is clearly established by *Merchants Heat & Light Co. v. James B. Clow & Sons,* 204 U. S. 286; 51 L. Ed. 488. It was there said by Mr. Justice Holmes (290; 490):

> "There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits,"

and again (290; 490):

> "* * * there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and, to the extent of his claim, a cross plaintiff in the suit."

Although different in its facts, that case is completely identic in principle with the one at bar. The suit was in the Circuit Court of the United States for the Northern District of Illinois by a citizen of that State against a citizen of Indiana. The defendant moved to set aside the service, the ruling was adverse, and it excepted. It then answered and set up a counterclaim by way of recoupment and sought to recover a balance. Judgment went against it and it appealed to this Court, assigning as error the denial of its motion to set aside the service.

This Court declined to express an opinion upon the merits of the motion "because it is not necessary for the decision of the case, in view of the submission to the jurisdiction which the facts disclose." However, assuming that defendant lost no rights by pleading to the merits, as required, after saving its rights, this Court held that "by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the Court in the same action, and, by invoking, submitted to it."

In discussing the effect of its pleading the counterclaim, Mr. Justice Holmes said (289; 489):

> "* * * But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking, submitted to it. It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper. But, even at common law, since the doctrine has been developed, a demand in recoupment is recognized as a cross demand, as distinguished from a defense. Therefore, although there has been a difference of opinion as to whether a defendant, by pleading it, is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross demand, and that whether he shall do so or not is left wholly to his choice. (Citing cases) This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences. The right to do so is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense."

Mr. Justice Holmes cited *Fisher v. Shropshire*, 147 U. S. 133; 37 L. Ed. 109, in which Mr. Chief Justice Fuller said (145; 116):

> "* * * we are not prepared to hold the Circuit Court should be deprived of jurisdiction at the suggestion of the party who voluntarily invoked it."

That Respondents became actors cannot reasonably be questioned. Pursuant to the order of reference directed for the purpose of determining the parties entitled to distribution of the *res,* Respondents, at a hearing regularly held by the Special Master as a part of the proceedings in the Primary Cause, presented formal proofs of claim, procured them to be made a part of the record, and presented evidence in support of them (R. 36, 4, 6, 10, 13). Thereby they came into the cause to gain the benefit and avail themselves of the advantages of the decree creating the fund in which they seek to share. The course they pursued is the exact legal equivalent of an action against Tower Hill had there been no receivership. In such contingency, they would have exposed themselves to the risk of counterclaim and set-off. Having presented their claims, or in legal effect instituted their suits, the Ancillary Bill is but a method of bringing the counter demands of Tower Hill, now represented by Receivers, on the Record.

The lone respect in which the case of *Merchants Heat & Light Co. v. James B. Clow & Sons, supra,* differs from the one at bar is that in the former the defendant was not bound to plead the counterclaim, while here Respondents, if they elected to enforce their claims, were bound to come into the District Court. That this distinction is without legal effect a moment's reflection will readily show.

The law vesting the District Court with jurisdiction to administer the *res* and to determine claims to participate in its distribution is what required Respondents to go into that tribunal. That law deprives them of no right and leaves them perfectly free to go in or stay out, just as before the receivership they were free to sue or not to sue as they chose. The only effect of the receivership was to restrict the tribunals in which

they otherwise could have asserted their claims to the particular one having custody of the *res*.

Had there been no receivership, they could have sued in any Court having jurisdiction, federal or state, but they would have run the risk of counterclaim and set off, exactly as is set up in the Ancillary Bill, and to hold, as they now contend, that the result of the receivership is to afford them an immunity they otherwise would not have had, is to defeat the very purpose of the law vesting a court having possession of a *res* with power to determine the liability of third persons to it.

Whether the District Court should adjudicate Tower Hill's claim against Respondents was a matter of choice with them. Respondents were not obliged to invoke its jurisdiction, and Petitioners were powerless to compel them to do so.

Just as does any suitor, they decided to proceed and thereby subjected themselves to the dangers incident to such a course—in this instance the hazard of having it judicially determined that instead of their having a right to receive a portion of the Tower Hill *res* in distribution, they were actually liable to account to the receivership estate for the part of the *res* held by them. They knew the worth of their demands and the strength of the counter charges against them, and their choice to move to enforce the former was but an election to pit them against the latter.

Commercial E. S. Co. v. Curtis, 288 Fed. 657;
Circuit Court of Appeals, Eighth Circuit.

On May 4, 1920, a receiver of the properties and assets of the Commercial Electrical Supply Company was appointed upon a general creditor's bill. On June 6, 1920, Curtis filed an intervening petition and a veri-

fied claim asserting that the Supply Company was indebted to him but claiming no lien upon the receivership assets. On January 6, 1921, the trustees under mortgages upon the receivership property intervened and sought foreclosure of their mortgages. On October 3, 1921, a decree of foreclosure was entered, followed by a substituted decree of foreclosure entered November 28, 1921. Subsequent to the entry of these decrees of foreclosure, Curtis filed an amended intervening petition in which he asserted facts to show that his claim was prior in right and lien to the lien of the foreclosed mortgages. The question before the court was whether he was bound by the decrees of foreclosure and, consequently, precluded from asserting the lien alleged in the intervening petition. The Court below held that Curtis was concluded by the foreclosure decrees. In affirming that decree, the Circuit Court of Appeals, in an opinion by Judge Sanborn, said (659):

> "It is the general rule that one who voluntarily intervenes in a suit in equity thereby becomes a party to the suit, is in the same situation, bound by the same orders and decrees, and subject to the same estoppels, as though he had been a party from the commencement thereof. * * *
>
> "Counsel for the claimant stated in their reply brief that the claimant filed an intervening petition in the suit on June 6, 1920, and the court assumes that to be the fact. The record contains no copy of that petition. It does, however, contain a copy of a verified claim of the claimant filed on that day with the receiver, wherein no lien, estoppel, or superior equity was claimed, and the receiver subsequently classified that claim and reported it to the court as an open account for which no lien was claimed. The voluntary filing of this verified claim

and of this intervening petition in the equity suit on June 6, 1920, made the claimant thenceforth a party to this suit in equity, charged it with notice of all proceedings therein, bound it by all the orders and decrees thereof, and vested it with the right to appeal from the final decrees if it felt aggrieved thereby."

In an opinion by Mr. Chief Justice Fuller in *Rouse v. Letcher,* 156 U. S. 47; 39 L. Ed. 341, this Court held that a person having a claim to share in the distribution of receivership assets was properly allowed to intervene and prove her claim, and it is indicated that the assertion of the right to share in the assets is in essence an intervention in the receivership proceeding.

It is clear that intervention is not dependent on the form in which it is brought about and that any act effective to establish a claim against the receivership assets amounts to an intervention.

In *Rouse v. Letcher, supra,* the claim of the intervenor was referred to a Special Master to be heard, subject to exceptions to be filed in court. In the case at bar, the Special Master was appointed to hear, determine and report to the Court all claims that might be presented without the precedent formality of a technical petition to intervene. The order of reference dispensed with the necessity of securing leave to present their claims, and when Respondents, under that order, presented and filed their claims, they were in exactly the same situation as if they had done so after intervention granted on their formal application.

Stewart et al. v. Dunham et al., 115 U. S. 61; 29 L. Ed. 329. Mr. Justice Matthews there said (64; 330):

"* * * The right of the court to proceed to decree between the appellants and the new parties did not

depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely matter of form whether the new parties should come in as co-complainants or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing."

If Judge Northcott, in writing the opinion under review, had adhered more strictly to the principles stated by him in *Massachusetts Bonding and Insurance Co. v. Concrete Steel Bridge Co.*, 37 Fed. (2d) 695, a different result would have obtained. He there said (701):

> "It is held in the state courts of West Virginia that by appearance in an action for any other purpose than to take advantage of defective process or service thereof a defendant waives all objections which he might otherwise have to the writ or service. *State v. Coal Co.*, 49 W. Va. 143, 38 S. E. 539; *Fulton v. Ramsey*, 67 W. Va. 321, 68 S. E. 381, 140 Am. St. Rep. 969; *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761."

He cites and quotes with approval *Dailey Motor Co. v. Reaves*, 184 N. C. 260; 114 S. E. 175, 176, in which the Supreme Court of that State said:

"Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general."

Fulton v. Ramsey, 67 W. Va. 321.

The Supreme Court of that State dealt with a question whether or not a certain motion or order shown by the record was a general appearance. That Court, in an opinion by Judge Poffenbarger, held that it was nothing more than an inquiry addressed to the court for information as to what could be done by way of obtaining a postponement of the cause, and ruled that it was not a general appearance. In considering the requisites of such an appearance, Judge Poffenbarger said (326):

"No instance can be found in which a party has been held to have impliedly bound himself to submission, without having asked or received some relief in the cause or participated in some step taken therein."

And again (327):

"The instances of the assumption of the role of actor in a suit, disclosed by the federal decisions, are such as the taking of a continuance; filing a demurrer to plaintiff's pleadings, without limiting it to the question of jurisdiction; filing a plea of intervention; pleading to issue or to the merits in the first instance; or filing sets-off, counter-claims or notices of recoupment."

Judge Poffenbarger further says (328):

> "These precedents amply sustain the view that something substantially beneficial to the defendant or detrimental to the plaintiff, relating to or affecting the progress of the cause, asked, done or accepted by the former, is essential to the establishment of a waiver of process or service thereof. There must be something more than a mere pretext for the claim of jurisdiction over him. He must either enter an appearance, ask some relief in the cause, accept some benefit as a step therein or do something from which the necessary implication of submission to the jurisdiction of the court over his person arises."

Holding that the order was an appearance, Judges Brannon and Williams dissented, and the former, in a vigorous opinion, cited and quoted *Frank v. Zeigler,* 46 W. Va. 614, the authority of which was not questioned by the majority (331):

> " 'If a party appear in a suit for any purpose other than to object to the legality of process or its service, it is a general, not a special, appearance, and dispenses with service of process'."

Arnold & Ruffner v. Casner, 22 W. Va. 444.

In point 3 of the syllabus it is said:

> "Creditors who file their claims before the commissioner in such a suit (creditors' bill), although not formal parties to the bill, become informal parties to the suit and are as effectually bound, and the court has the same jurisdiction over them, as if they had been made formal parties to the bill and been served with process."

In that case, the lower Court had ruled that persons proving claims in the cause were not parties thereto or bound by decrees therein. This contention was overruled by the Supreme Court. In its opinion it said:

> "The usual course is to publish a notice convening the creditors and thereby informally making them parties. And such informal parties have the same control and right to file and have their claims adjudicated in the cause as if they had been formally by name or as a class made parties, and upon filing their claims before the commissioner they become bound by the proceedings in the cause as fully as the most formal parties.

The Casner case continues to be the law of West Virginia: *Bilmyer v. Sherman,* 23 W. Va. 656; *Wyatt v. Smith,* 25 W. Va. 813; *Bent v. Read,* 82 W. Va. 680.

Newman v. Moore, 94 Kentucky, 147.

The Supreme Court of that State said (148):

> "But she filed exceptions in open court to the commissioner's report, fixing the amount coming to Newman, which were sustained by the court, and as she thus took part in the trial, and by her exceptions combated the claim set up in Newman's action, she cannot be allowed to say that she was not in court. She cannot appear in court and attempt to defeat the purpose sought to be effected by the cross-petition, and yet shelter herself behind the plea that she has not been summoned. We think she thereby entered her appearance."

It cannot be denied that Respondents are in court for the purpose of obtaining affirmative relief. This they seek through the medium and in virtue of the cause

into which they have voluntarily come. If it is a settled principle that the seeking of affirmative relief constitutes the seeker an actor and a party to the cause in which the relief is sought, it cannot well be asserted that Respondents are not parties to the receivership cause.

There is admittedly a controversy between Respondents and the receivership estate, represented by Petitioners, as to whether Respondents are entitled to receive a part of the *res* or, on the contrary, are required to make contribution thereto. Of at least a part of this controversy, the District Court had undoubted jurisdiction, which Respondents invoked, and the governing principle in such case is well expressed by Mr. Chief Justice Taft in *Hartford Accident and Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207; 71 L. Ed. 612, in which he said (217; 616):

> "* * * Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide the whole issues and award complete relief even where the rights of parties are strictly legal and the final remedy granted is of the kind which might be conferred by a court of law."

(b) Equity Rule 30.

The second paragraph of this Rule is—

> "The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up,

shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross-claims."

American Mills Co. v. American Surety Co. of New York, 260 U. S. 360; 67 L. Ed. 306. This Court, by Mr. *Chief* Justice Taft, said (364, 309):

"The new Equity Rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence, and by uniting in one action as many issues as could conveniently be disposed of."

After holding that a defendant, notwithstanding that the set-off or counterclaim arose out of a transaction which is the subject matter of the suit, was not required to plead the counterclaim unless it was of a character cognizable in equity, the Chief Justice continued—

"* * * The counterclaim referred to in the first part of the paragraph (Equity Rule 30) must therefore be an equitable counterclaim—one which, like the set-off or counterclaim referred to in the next clause, could be made the subject of an independent bill in equity. The counterclaim and the set-off and counterclaim in the two clauses are in *pari materia* except that the first grows out of the subject-matter of the bill and the other does not. That which grows out of the subject-matter of the bill must be set up in the interest of an end of litigation. That which does not may be set up, if the defendant wishes, in one proceeding in equity quickly to settle all equitable issues capable of trial between them in such a proceeding, even though they are not related. *Buffalo Specialty Co. v. Van Cleef*, 217 Fed. 91. The formality of cross bills is not required, and the rule goes as far as possible to facilitate the

prompt disposition of equitable controversies between the same litigants. The rule should be liberally construed to carry out its evident purpose of shortening litigation, but the limitation of counterclaims to those which are equitable is imperative."

Buffalo Specialty Co. v. Van Cleef, 217 Fed. 91, which was cited with approval by Mr. Chief Justice Taft. In that case the Court said (93):

"It will be seen that Rule 30 requires defendant to set up any counterclaim which arises out of the transaction forming the subject-matter of the bill, but allows without requiring him to set up any equitable counterclaim or set off which might be the subject of an independent suit by defendant against plaintiff. The language is perfectly clear: If defendant has an independent cause of action in equity against plaintiff, he may counterclaim it. If any corroboration of this view were needed, it is found in the fact that the Supreme Court, in adopting the rule, omitted the last clause of the English rule which restricts counterclaims to those which can be conveniently disposed of and those which ought to be allowed. Not only was any set-off or counterclaim which may be the subject of an independent suit included, but an exception was rejected. Moreover, it has always been held by the English courts that independent causes of action, wholly unconnected with the claim of the plaintiff, may be counterclaimed."

Since Respondents, by assertion of their claims in the receivership proceeding, are seeking affirmative relief against the *res,* their demands, without regard to the form in which they are cast, are in essence bills in

equity against Tower Hill, and the Ancillary Bill, notwithstanding its form, is likewise in essence an answer setting up counterclaims, which, although they might have been the basis of an independent bill, are still within the express terms of Equity Rule 30.

If "the new Equity Rules were intended to simplify equity pleading and practice" and Rule 30 "goes as far as possible to facilitate the prompt disposition of equitable controversies between the same litigants," Petitioners respectfully submit that the very purpose of the Rule requires the District Court to adjudicate not only Respondents' right to participate in the *res* but their liability to account to the *res*, and to settle in one proceeding all controversies between Petitioners and Respondents respecting the *res*.

The application of Equity Rule 30 to this case is well stated by Judge Soper in his dissenting opinion (75 Fed. (2d) 457; R. 75):

> "Furthermore, there seems to be no important reason why Equity Rule 30, promulgated November 4, 1912, (28 U. S. C. A. § 723) should not be applied to the situation which arises when a receiver has a set-off or counterclaim in equity, growing out of an independent transaction, against a claimant. This rule provides in substance that the defendant in his answer to a suit in equity may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim shall have the same effect as a cross suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the counterclaim. By the passage of this rule, the Supreme Court, in

order to make it possible to put an end to all controversies between the same parties in a single suit, changed the former practice which confined set-offs and counterclaims to those which arose out of the transaction that formed the basis of the original suit. Since the filing of a disputed claim against a receiver in an equity proceeding is in one aspect a separate suit, it falls within the scope of Equity Rule No. 30, and the receiver should have the same right to set-off or counterclaim as would have been accorded to the corporation before the receiver was appointed."

Petitioners respectfully submit that this wise and practical exposition of Equity Rule 30 is legally sound and that it is not answered or avoided in any way by the majority opinion of the Circuit Court of Appeals.

That the counterclaims against Respondents were asserted by Receivers in the form of an Ancillary Bill instead of by answers to Respondents' claims as pleaded before the Master is not a sufficient reason for refusal to apply the provisions of Equity Rule 30, has been decided in principle by this Court in *Young v. McNeal-Edwards Company,* 283 U. S. 398, 75 L. Ed. 1140. The McNeal Company, a Virginia corporation, sold the Young Company, a Massachusetts corporation, 1107 drums of oil, buyers to return the drums. The Massachusetts corporation sued the Virginia corporation in the United States District Court of Massachusetts for breach of warranty of quality and attached the drums. Later the Virginia corporation sued the Massachusetts corporation in the same Court for conversion of the drums. Still later the Massachusetts corporation discontinued its former action and brought a second suit against the Virginia corporation in the same court

for breach of warranty of quality and had the writ served upon the attorney of record in the Virginia corporation's suit. This service was pursuant to a Massachusetts statute which provided that "if an action is brought by a person not an inhabitant of the commonwealth * * * he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other", and that "the writ in such cross action may be served on the attorney of record for the plaintiff in the original action." The question in this Court was whether, under the Conformity Act and the Massachusetts statute, the District Court acquired jurisdiction over the Virginia corporation. This Court held that the Massachusetts statute, as it applied to the Virginia corporation, was only a slight extension of the doctrine of recoupment recognized in Massachusetts apart from statute and that the Massachusetts principle would be applied in the courts of the United States. In the opinion of this Court, Mr. Justice Holmes said (400, 1141):

> "* * * Giving the counterclaim the formality of a separate suit hardly is a sufficient reason for refusing to apply the local policy and law. *Arkwright Mills v. Aultman & T. Machinery Co.*, (C. C.) 128 Fed. 195, 196. Mr. Langdell observes that there is no necessity for such ceremony in the nature of things 'for, the plaintiff being already in court *qua* plaintiff by his own voluntary act, it is reasonable to treat him as being there for all the purposes for which justice to the defendant requires his presence.' *Langdell*, Eq. Pl. chap. 5, § 119. The characterization of the contrary doctrine as pernicious by Mr. Justice Miller in *Partridge v. Phoenix Mut. L. Ins. Co.*, 15 Wall. 573, 21 L. ed. 229, is repeated

in *Chicago & N. W. R. Co. v. Lindell,* 281 U. S. 14, 17, 74 L. ed. 670, 672, 50 S. Ct. 200. We see no reason to doubt the constitutionality of the present application of the state law. The policy of it is embodied in equity rule 30. See *Aldrich v. E. W. Blatchford & Co.,* 175 Mass. 369, 56 N. E. 700."

Mr. Justice Butler in *Chicago & N. W. R. Co. v. Lindell,* 281 U. S. 14; 74 L. Ed. 670, cited by Mr. Justice Holmes, said (17, 672):

> "The adjustment of defendant's demand by counterclaim in plaintiff's action rather than by independent suit is favored and encouraged by the law. That practice serves to avoid circuity of action, inconvenience, expense, consumption of the court's time and injustice."

In support of this, a number of cases are cited, among them *Partridge v. Phoenix Mut. L. Ins. Co.,* 15 Wall. 573; 21 L. Ed. 229, referred to by Mr. Justice Holmes, from which Mr. Justice Butler quotes the language of Mr. Justice Miller (17; 673):

> "It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held and escape the liability which the laws of the State have attached to all plaintiffs of allowing just and legal set-offs and counterclaims to be interposed and tried in the same suit and in the same form."

(c) APPLICATION OF THESE PRINCIPLES.

In order to make direct application of the principles just discussed, it may be helpful to consider in some detail Respondents' participation in the Primary Cause.

In the Primary Cause, the District Court appointed a Special Master to "take, state and report an account and report to the Court showing" all the debts, obligations and claims against Tower Hill, and the owners of its preferred and common stock (R. 1, 2).

As directed by the order, the Special Master set a hearing at Charleston, West Virginia, for January 30, 1934, and gave the prescribed notice (R. 36).

At the hearing, Watson, one of the Respondents, attended in person and testified that he was an attorney at law, and was secretary and director of Hecla, and that Hecla owned 2037 shares of preferred stock and 2451 shares of common stock of Tower Hill (R. 36). He filed the certificates for these shares and, in connection with his testimony, filed Hecla's formal proof of claim marked "Proof of Claim of Hecla Coal & Coke Company as the Owner of Shares of the Preferred Stock and the Common Stock of the Tower Hill Connellsville Coke Company of West Virginia". This proof of claim (R. 4) is captioned in the Primary Cause and is addressed to "J. E. Campbell, Special Master in Chancery in the above proceedings". In it Hecla "files this its proof of claim with you, for the purpose of participating in any distribution or liquidating dividend paid by the Tower Hill Connellsville Coke Company of West Virginia or the Receivers thereof, to either its Preferred or its Common stockholders or to both".

After Watson retired from the stand, John T. Wilson was sworn and testified under examination by Wat-

son (R. 37). Who Wilson was the Record does not disclose, but it does appear that he had examined the books of Tower Hill. Under Watson's examination, he testified that Tower Hill's books showed that it owed Hillman $250.00 as salary for the month of October, 1933, and a like amount to Watson as salary for the same period.

The only purpose of this examination and testimony was to show that Hillman and Watson were creditors of Tower Hill, and to have the Master so find and report to the Court. Clearly, Watson was in court in person, seeking a distribution from the *res* on his own behalf, and as attorney for Hillman seeking distribution on his behalf.

In connection with his examination of Wilson, Watson tendered, and at his instance there were filed, the following additional proofs of claim, each of which is captioned in the Primary Cause and is addressed to "J. E. Campbell, Special Master in Chancery in the above proceedings" (R. 37).

(1) Proof of claim of Thomas Watson, marked "Proof of Claim of Thomas Watson", for professional services rendered (R. 6). In it Watson "files with you his Proof of Claim against the Tower Hill Connellsville Coke Company of West Virginia in the sum of $33,750.00" and concludes his proof with "Claimant respectfully asks that his claim as above set forth may be allowed against the Defendant Tower Hill Connellsville Coke Company of West Virginia" (R. 10).

(2) Proof of claim of Hillman Company, marked "Proof of Claim of Hillman Coal & Coke Company", for office expense and general overhead for the month of October 1933 (R. 10). In it Hill-

man Company "files with you its Proof of Claim against the Tower Hill Connellsville Coke Company of West Virginia in the amount of $2,720.03". In concluding its proof, it states "All of the assets of the defendant Tower Hill Connellsville Coke Company of West Virginia passed into the possession of its receivers on or about October 26, 1933, and consequently the above items remained due, owing and unpaid (R. 13).

(3) Proof of claim of Hillman and Sheets, marked "Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets as Sureties upon the Supersedeas Bond of Tower Hill Connellsville Coke Company" (R. 13). This proof of claim is signed by Sheets individually and by Hillman "By Thos. Watson, Atty.", thereby clearly showing that Watson, in appearing before the Special Master and examining the witness Wilson, was appearing on behalf of Hillman.

The decree appointing Receivers in the Primary Cause brought within the jurisdiction of the District Court Tower Hill's entire assets of every character. It constituted them the *res* to be administered by the Court. That some of the assets did not come into the possession of the Receivers forthwith upon their appointment, but remained in the hands of third parties, did not withhold them from the jurisdiction of the District Court. The principle which is the basis of the ancillary jurisdiction of a receivership court is that the court is entitled to possession and administration of the entire *res* of the trust estate and, consequently and necessarily, may exercise any authority required to obtain such possession and fully to effect such administration, and in the exercise of such authority, it is unhampered by the limitations upon its jurisdiction existing in original actions.

That all these claims are equitable in character and properly cognizable in a court of equity is discussed in the succeeding section of the Argument. Clearly they are as much a part of the *res* as were the notes and accounts receivable in *White v. Ewing, supra,* and the unpaid stock subscription in *Peck v. Elliott, supra.*

How, then, upon controlling authority as well as in principle, can there be any question that the claims against Respondents are a part of the *res* or that the District Court has jurisdiction of the subject matter of the Ancillary Bill?

Merchants Heat & Light Co. v. James B. Clow & Sons, supra, is conclusive authority for the proposition that action for affirmative relief in a cause is submission to the jurisdiction of the court. In that case the defendant became an actor and, consequently, a party, because it asserted an affirmative defense by way of recoupment, notwithstanding that otherwise the court was without jurisdiction and the defendant was in court without sanction of law and against its protest. It might well have been said of that defendant that it was seeking only to protect its rights in a court which was not of its own choosing and into which it had been illegally brought, and yet this Court held that the minute it stepped over the line of pure defense and sought affirmative relief, even by way of defense, it submitted itself to the jurisdiction and became a party.

In the case at bar, the reason for the application of the principle is much stronger. Respondents are volunteers. They are in court at their own instance and for their own purposes. They affirmatively asserted claims, not by way of defense against anything sought from them, but in their desire to get something out of

the *res*. This was the situation which existed when the Ancillary Bill was filed. In it, the Petitioners merely sought to recover, for the benefit of the *res*, against claimants voluntarily appearing to participate in the *res*. To say that Respondents are not in court is to draw a distinction between an affirmative claim asserted by a defendant who has been illegally summoned and has protestingly appeared, and a like claim, freely asserted by one who has voluntarily appeared. There is no basis in reason for such distinction and none can be found in authority. In each instance, however the claimant got into court, he sought relief and was an actor, and, consequently, a party.

It is difficult to conceive of a situation where a person could more emphatically assume the role of an actor. Respondents are in reality intervenors, not to defend the action, but to enforce their personal claims.

If these parties had appeared in open court and presented their claims at a hearing before the Chancellor, their participation in the suit would be undoubted.

That the particular portion of the cause in which they took their action was before a Master and not the Chancellor in person, does not make a whit's difference. The cause was pending in the Court and what Respondents did before the Master, to whom there was due reference, is just as much a part of the cause as had it occurred in the presence of the Chancellor himself. The point is that by what they did, Respondents became actors in the cause, and it is immaterial whether it was by filing papers in the office of the Clerk, participating in hearings before the Master, or appearing before the Chancellor.

As has been often judicially said and as the cases already cited show, a person cannot be in court and out of court at will. For like reason, he cannot be in court for one purpose and out of court for cognate and allied purposes.

The position of Respondents is directly to the contrary. Summarized in a brief but accurate way, it is that they are in court to share in the assets, but out of court to keep from making their just contribution to the assets, and that they can come into court and take from other claimants what, were it not for their demands, such claimants would receive, but out of court when such claimants attempt to coerce them to discharge the just demands of the estate against them.

(3) The Claims Against Respondents.

It seems to Petitioners that the claims against Respondents are so clearly equitable in character that there can be no reasonable question but that they are the proper subject of counterclaim under Rule 30. The facts averred in the Ancillary Bill show that Respondents occupied a fiduciary relationship toward Tower Hill. They are called upon to explain certain transactions which by virtue of that relationship they caused Tower Hill to enter into, and if, as the Ancillary Bill avers, such transactions were fraudulent, to account to Tower Hill for the injuries caused by their lack of fidelity. Equity alone can unravel the complicated facts involved in these continuing transactions and place the blame where justice requires. However, the Circuit Court of Appeals implies, without specifically holding, that at least some of these claims may be legal and actionable only at law (75 Fed. (2d) 451, 455; R. 72), and in their answer to the petitions for certiorari Respond-

ents asserted that these claims are not equitable and that under the Seventh Amendment and Section 367 of the Judicial Code they are actionable only at law and cannot be the basis of counterclaims under Rule 30.

In view of the attitude of the Circuit Court of Appeals and the assertions of Respondents, Petitioners are led to consider these claims in greater detail than otherwise they would have felt justified.

(a) THE FACTS.

The Ancillary Bill sets up four claims. All of them are against the individual Respondents. One of them involves the Hillman Company and another Hecla.

The relationship of Hillman, Sheets and Watson to Tower Hill and to its subsidiary and affiliated corporations, which together constitute the Hillman Interests, and some of the transactions which are the basis of the claims against Respondents, were the subject of much testimony in the Primary Cause and were carefully considered by the District Court and upon two appeals by the Circuit Court of Appeals (33 Fed. (2d) 703; 64 Fed. (2d) 817).

(1) Claims Against Hillman, Sheets and Watson for Moneys Illegally Taken Under the Guise of Salaries.

These claims are set forth in Paragraphs 4 to 7, inclusive, of the Ancillary Bill (R. 41-43).

The properties and assets now owned by Tower Hill and in possession of Petitioners were formerly owned in part by Tower Hill Connellsville Coke Company, a Pennsylvania corporation, all of whose stock was owned

by Tower Hill, which is a West Virginia corporation, and in part by Eastern Coke Company, also a Pennsylvania corporation, all of whose stock was owned by Tower Hill of Pennsylvania. On July 30, 1929, during the pendency of the Primary Cause, Eastern Coke transferred all its properties and assets to Tower Hill of Pennsylvania, as a liquidating dividend, and on January 8, 1930, while the Primary Cause was still pending, Tower Hill of Pennsylvania, conveyed all its properties and assets to Tower Hill, the West Virginia corporation (64 Fed. (2d) 817, 819).

The claims against Hillman, Sheets and Watson are that during the period from May, 1920, to January, 1930, they appropriated from one or more of these corporations large sums of money under the guise of salaries as President, Vice President or Treasurer, and Secretary, respectively, and that these withdrawals were not authorized by any corporate action, were excessive in amount, and constituted illegal appropriations of the funds of these corporations.

The Ancillary Bill seeks the recovery of these funds. These claims involve (1) a breach by these individuals of their fiduciary relationship to these corporations as directors and officers; (2) the laws of West Virginia and Pennsylvania as to the legality of salaries to executive officers in the absence of corporate authorization; (3) an accounting by these individuals, if they are entitled to any compensation, as to the services rendered by them and an adjudication by the Court as to what, if any, compensation they were entitled to receive in view of these services and in the light of all the circumstances; and (4) to what extent, if any, each of these individuals may be liable for funds illegally taken under the guise of salaries by the others.

(2) THE EMERALD TRANSACTION.

The facts regarding this transaction and the basis of the claim against Hillman, Sheets and Watson on account thereof are set forth in Paragraphs 8 to 14, inclusive, of the Ancillary Bill (R. 43-45).

The charge is that without any corporate authorization, $1,184,000 of Tower Hill's funds were expended in the purchase of stock of Emerald Coal & Coke Company, of no market value and doubtful intrinsic worth. This transaction was in discharge of a personal obligation of Hillman. It was done at his instance, with the knowledge and consent of Sheets and Watson. As averred in the Ancillary Bill, this transaction is a plain breach of trust, and an accounting is sought for the injury done to Tower Hill.

The equitable character of this claim, as stated in the Ancillary Bill, appears from the opinion of the Circuit Court of Appeals on the former appeal (64 Fed. (2d) 817, 820, 823):

> "* * * The Emerald transaction alone proves conclusively the utter disregard, on the part of those dominating the Tower Hill of West Virginia, of the rights of the preferred stockholders, and a deliberate intention to trample upon those rights. Unless the 'arm of equity be shortened or palsied' it can certainly reach the trouble here and give to the plaintiffs that relief to which they are clearly entitled."

(3) The Claim Against Hillman Company

This claim is set forth in Paragraphs 15 to 27, inclusive, of the Ancillary Bill (R. 46-51).

Tower Hill and the Respondents, Hillman Company and Hecla, were three of a large number of corporations of which Hillman, Sheets and Watson were directors and of which they were, respectively, President, Vice President or Treasurer, and Secretary. Paragraph 15 of the Ancillary Bill (R. 46) charges that the majority directors and officers of these corporations were the same persons, and were the nominees and, for practical purposes, merely the employees of Hillman.

The claim is that at the direction of Hillman and with the acquiescence of Sheets and Watson, the Hillman Company acted as manager of a pooling arrangement under which the selling, office and operating expenses of these various corporations dominated by Hillman were pooled and prorated among the corporations in accordance with directions from time to time given by Hillman, Sheets and Watson, with the result that the payments exacted from Tower Hill on account of such expenses far exceeded the fair, reasonable and conscionable expenditures for such purposes, working to the detriment of Tower Hill and its stockholders and to the gain and advantage of Hillman, Sheets and Watson and their allied interests.

The Ancillary Bill seeks an accounting of the operation of this pooling arrangement and an adjudication as to the extent, if any, to which, under all the circumstances, Tower Hill should have been involved therein and should have contributed thereto, and for all moneys improperly taken from Tower Hill on account thereof,

recovery is sought against the Hillman Company and against Hillman, Sheets and Watson.

(4) The Hecla Transaction.

This transaction is the subject of the averments of paragraphs 28 to 35, inclusive, of the Ancillary Bill (R. 51-54).

The onus of this complaint is that Hecla, in selling and disposing of its property, was obliged to include certain property of Tower Hill and in the sale it was required to take over as part of the purchase price a worthless mine and coke plant known as Thompson No. 1. Hillman, Sheets and Watson, directors of both Hecla and Tower Hill, having a greater concern and larger interest in Hecla, compelled Tower Hill to accept the worthless plant.

The Ancillary Bill charges that if Tower Hill had been independently managed and directed, and had not been under the domination of Hillman, Tower Hill would not have had foisted upon it the practically worthless Thompson No. 1 Plant but would have received cash for the coal lands which it conveyed to the Weirton interests. An accounting is sought against Hillman, Sheets and Watson, who, as the common directors and officers of Tower Hill and Hecla, sacrificed the interests of Tower Hill for the benefit of Hecla, and against Hecla, as the majority stockholder of Tower Hill and the beneficiary of this breach of trust. This accounting involves not only the transaction as it was consumated in 1929 when the Thompson No. 1 Plant was conveyed to Tower Hill, but the credits and debits incident to the possession of Thompson No. 1 since that time. Petitioners' position is that in equity Thompson No. 1 was never owned

by Tower Hill and that a decree should now be entered against Hecla, Hillman, Sheets and Watson adjudicating that the Tower Hill receivership estate should be made whole, with like effect as if in 1929 Tower Hill had been paid in cash for the coal land conveyed to the Weirton interests, and that the Thompson No. 1 plant should be now conveyed to whomsoever the Court, under all the circumstances, may adjudicate should receive such conveyance.

This transaction is commented on in the opinion of the Circuit Court of Appeals upon a former appeal (64 Fed. (2d) 817, 819).

(b) THE LAW.

That the causes of action as thus outlined and set up in the Ancillary Bill are cognizable in a court in equity seems too rudimentary to require extended discussion or copious citation.

Officers, directors and majority stockholders who have appropriated to themselves the control of a corporation sustain a relationship to the corporation itself and to its stockholders that is fiduciary in character, demanding the utmost good faith and prohibiting any gain or profit for their advantage or aggrandizement. Although they are not technically trustees, because the title of the corporate property is not in them, courts in equity from the earliest days have regarded them as *quasi* trustees and have held them liable as if they were trustees on the theory that their failure to perform their duties *uberrima fide* is a breach of trust.

Equity has jurisdiction of all relationships of trust and confidence and entertains any complaint based on a breach thereof, even though only a monetary decree be sought.

In *Hornor v. Henning,* 93 U. S. 228, 23 L. Ed. 879, the Court had under consideration the Act of Congress, 16 Stat. at L. 98, authorizing the formation of corporations within the District of Columbia, which provides that if the indebtedness of the corporation should at any time exceed the amount of its capital stock, the trustees of the corporation assenting thereto should be personally and individually liable for such excess to the creditors of the corporation. An action at law, based on this statute, was brought by a creditor of the Washington City Savings Bank against its directors. In holding that the suit at law would not lie but that the remedy was in equity, Mr. Justice Miller, speaking for this Court, said (231; 880):

> "We are of opinion that the fair and reasonable construction of the Act is, that the trustees who assent to an increase of the indebtedness of the corporation beyond its capital stock are to be held guilty of a violation of their trust; that Congress intended that, so far as this excess of indebtedness over capital stock was necessary, they should make good the debts of the creditors who had been the sufferers by their breach of trust; that this liability constitutes a fund for the benefit of all the creditors who are entitled to share in it, in proportion to the amount of their debts, so far as may be necessary to pay these debts.
>
> "The remedy for this violation of duty as trustees is in its nature appropriate to a court of chancery."

A leading case dealing with the duties and liabilities of directors of a corporation is *Jackson v. Ludeling,* 88 U. S. 616; 22 L. Ed. 492, in which Mr. Justice Strong, speaking for this Court, said (624; 495):

"* * * All these parties were at hand, residents in or near Monroe. As officers of the Company they had the custody and charge of the railroad and all the property of the Corporation. And they held it in a very legitimate sense as trustees. Certainly they were the trustees of the stockholders, and also, to a considerable degree, of the bond holders, owners of the mortgage."

And again (625; 495):

"* * * They (the directors) had no right to enter into or participate in a combination, the object of which was to devest the Company of its property and obtain it for themselves at a sacrifice, or at the lowest price possible. They had no right to seek their own profit at the expense of the Company, its stockholders, or even its bond holders. Such a course was forbidden by their relation to the Company. It was their duty, to the extent of their power, to secure for all those whose interests were in their charge the highest possible price for the property which could be obtained for it at the sheriff's sale. They could not rightfully place themselves in a position in which their interests became adverse to those of either the stockholders or bond holders."

To the same effect is *Wardell v. Union Pacific Railroad Company*, 103 U. S. 651; 26 L. Ed. 509.

The comprehensive character of jurisdiction in equity when the matter of a trust or any fiduciary relationship is brought in question is discussed in the opinion of Mr. Justice Peckham in *Clews v. Jamieson*, 182 U. S. 461, 479; 45 L. Ed. 1183, 1193.

It has been consistently held that officers, directors and majority stockholders of a corporation occupy a fiduciary relationship to it and that a court in equity has jurisdiction to redress injuries suffered by the corporation through their breach of trust.

Jones v. Missouri-Edison Electric Co., 144 Fed. 765;
Wheeler v. Abilene National Bank Building Co., 159 Fed. 391;
Davis v. Pearce, 30 Fed. (2d) 85;
Moon Motor Car Co. v. Moon, 58 Fed. (2d) 90;
Wile et al. v. Burns Bros. et al., 2 Fed. Supp. 950;
Bosworth v. Allen, 168 N. Y. 157; 55 L. R. A. 751; 61 N. E. 163.

The pertinent parts of the opinions in these cases, together with a statement of the case in some instances, are printed in the Appendix.

(4) The Opinion of the Circuit Court of Appeals.

(a)

The Circuit Court of Appeals held that the question is whether the District Court acquired such jurisdiction over the persons of Respondents as authorized the granting of affirmative relief against them (75 Fed. (2d) 451, 453; R. 69). In answering this question in the negative, it is said (75 Fed. (2d) 451, 454; R. 69):

> "* * * The answer to this, however, is that under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause."

This does not accurately state what was done by Respondents. They did not file claims or proofs of claim

with the Receivers. They appeared personally or by counsel before the Special Master in the Primary Cause, presented claims, offered testimony in support of them, and sought decrees in their behalf.

The opinion cites (75 Fed. (2d) 451, 454; R. 69)—

Elkins v. First National Bank, 43 Fed. (2d) 777;
Acme White Lead & Color Works v. Republic Motor Truck Co., 285 Fed. 88;
Jones & Laughlins v. Sands, 79 Fed. 913;
Youtsey v. Hoffman, 108 Fed. 693;
Sands v. Greeley Co., 80 Fed. 195.

None of these cases, unless perhaps it be *Youtsey v. Hoffman,* involves the question of submission to jurisdiction.

The Elkins case denied a petition to intervene. The question was confined to distribution. Petitioners claimed that certain of the assets were imposed with a trust in their favor. It was held that they could present all their claims which were well pleaded before the special master, and that the petition did not show any of the funds to be impressed with a trust. Had it been so, said the Court, the question would have been different.

The Acme case is to the same effect. Intervention was denied because the petitioner could obtain full remedy before the master.

The Jones & Laughlins case involved a claim of a non-resident to participate in an ancillary receivership in which it was claimed that the residents of that State had priority. Jones & Laughlins petitioned to participate in the distribution on equality. It was denied.

The lower court, held that the issue could be determined by a proof of the claim and regular proceeding if it were denied. From that order an appeal was taken which was quashed because there was no final judgment.

The Greeley case is a petition of Jones & Laughlin to intervene in the cause referred to, in which intervention was denied because it could fully protect its claim in the manner indicated in the former case.

The Youtsey case is a District Court decision and proceeds on the theory that the receivers are not parties, and also holds that the claims attempted to be set up by the receivers were, under the controlling Kentucky statute, not counterclaims or set-offs. The question arose on a motion to remand and it appeared that no notice to charge him with liability had been given to Hoffman, who was the non-resident. Here it is conceded by Respondents and recognized by the Circuit Court of Appeals that Petitioners (Receivers) are parties. It could not have been held otherwise. They are enforcing the rights of the corporation itself, and there is none other legally enabled to do so. This is distinctly recognized in *White v. Ewing, supra; Peck v. Elliott, supra,* and many other cases. Furthermore, the court in the Youtsey case held that the claim there asserted was not a counterclaim or set-off within the meaning of the controlling Kentucky statute, while here the claims asserted by Petitioners are clearly within the meaning of Rule 30.

The Circuit Court of Appeals also referred to *Whelan v. Enterprise Transportation Co.,* 164 Fed. 95 (75 Fed. (2d) 451, 454; R. 69). The court there declined to follow *Peck v. Elliott, supra,* because the counterclaim was a legal one and not cognizable in equity. That question is here irrelevant for, as already discussed, every

cause of action set up in the Ancillary Bill is of purely equitable character and a court in equity would have jurisdiction wholly regardless of the receivership.

(b)

The Circuit Court of Appeals also held that when an ancillary bill brings in new parties they must be properly served with process to give the court jurisdiction (75 Fed. (2d) 451, 454; R. 69) and cites cases. Petitioners do not dispute that proposition, but their position, as accurately stated by the learned Judge of the District Court (R. 23) and already fully discussed, is that it is inapplicable because the Respondents are already in court and therefore no question of bringing them in is involved.

(c)

The opinion says (75 Fed. (2d) 451, 455; R. 73):

> "The claimants, by filing their claims in a court of equity, waive their right of jury trial with respect to the claims filed, but they do not waive such right with respect to independent claims against them which the receivers may seek to assert by way of counterclaim."

As heretofore shown, all the counterclaims asserted by Petitioners are equitable in character, and no question of right to jury trial is involved.

(d)

Finally, the opinion states (75 Fed. (2d) 451, 455; R. 71):

> "One filing a claim with a receiver, however, is in a very different position from one who has filed a bill in equity."

because, as is said, he is not a court of his own choosing, but in a court selected by others.

As formerly pointed out, Respondents did not merely file claims with the Receivers, but came into the receivership proceeding, filed formal proofs of claim and presented evidence in support of them. The Circuit Court of Appeals wholly disregarded that fact.

It is the law, and not any selection of Tower Hill or its Receivers or any other person, that vests in the District Court of the United States for the Southern District of West Virginia exclusive jurisdiction of claims against Tower Hill. It is just as competent for the law to restrict a claimant to one tribunal as it is for the law to enable him, in certain circumstances, to have a limited choice of two or more.

Whether Respondents would go in or stay out of the District Court was purely volitional. If it be said that they would have stayed out at the risk of losing their claims, the answer is that they would have been in no different position than any other suitor. If the law decrees that there is but one tribunal open to a suitor, he must enter that court and assume the risk of counterclaim or abandon his own claim. If by reason of exceptional circumstances more than one tribunal is open to him, he still must make his election. Will he abandon his claim or will he run the risk of counterclaim in the court in which he determines to assert his own claim? In any event, if he elects to assert his claim he must face the risk of counterclaim in a court in which the law prescribes the defendant may be sued.

Petitioners respectfully submit that in appearing before the Special Master in the District Court and asserting their claims, Respondents were in no differ-

ent position than if they had filed a bill in equity against Tower Hill in a court in which the law prescribed Tower Hill could be sued. When the receivership of Tower Hill occurred and thereby there was vested in the receivership court the exclusive jurisdiction over claims against it, Respondents were in exactly the position of one who has a claim against another. Respondents could assert their claims where the law prescribed Tower Hill and its assets could be found but in so doing they would assume the risk of whatever result their action entailed. They could abandon their claims, and if the Receivers pursued them in a court to whose process they were subject, they could there assert their own claims as counterclaims. They chose the former course, and while the Circuit Court of Appeals properly recognized their just right to appear in the District Court, fully establish their own claims, challenge the claims of others, appeal from any decision of the Chancellor, and participate in the distribution of the assets in accordance with the final decree, it granted them exemption from liability to counterclaim. The result, it seems to Petitioners, is not in harmony with precedent or principle. Whether Respondents be termed formal parties or *quasi* parties or by whatever other term they may be designated, the fact remains that they are in the receivership court asserting claims against Tower Hill and seeking distributions from its funds just as fully, for any and every purpose, as if they had filed a bill in equity against Tower Hill.

(c)

Reference is made in the opinion to *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430; 77 L. Ed. 408, in which Mr. Justice Butler said (435; 413):

> "The setting up of a counterclaim against one already in a court of his own choosing is very dif-

ferent, in respect to venue, from haling him into that court."

In that case the plaintiff asserted that he was not liable to counterclaim because, upon the grounds of venue, he could not have been sued upon the counterclaim in an original action in that court. This Court held that Section 48 of the Judicial Code, defining venue in patent cases, had no application to a counterclaim against a plaintiff already in court. The case, Petitioners submit, in no way sustains the proposition for which it is cited by the Circuit Court of Appeals, but to the extent that it is relevant, it is favorable to their contention.

Petitioners, with due respect, submit that for the reasons herein presented, Respondents, by coming into the pending cause, proving their claims and seeking the advantages of the decree, submitted to the jurisdiction of the District Court for the adjudication of equitable counterclaims asserted by Petitioners, and that the decree dismissing the Ancillary Bill should be reversed and the Record remanded with directions to reinstate the Ancillary Bill and proceed to a final decree.

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APPENDIX.

Clews v. Jamieson, 182 U. S. 461; 45 L. Ed. 1183.

Mr. Justice Peckham said (479; 1193):

"Pomeroy in his work on Equity Jurisprudence, second edition, instances, among other equitable estates and interests which come within the jurisdiction of a court of equity, those of trusts. In volume 1, at § 151, he says: 'The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience; and it has been extended so as to embrace, not only lands, but chattels, funds of every kind, things in action, and moneys.'

"All possible trusts, whether express or implied, are within the jurisdiction of the chancellor. In this case the committee, as a trustee, was charged with the performance of some active and substantial duty in respect to the management and payment of the funds in its hands, and it was its duty to see that the objects of its creation were properly accomplished. The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give 'depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest, or estate of the *cestui que trust,* and will compel the trustee to do all the specific acts

required of him by the terms of the trust. It often happens that the *final* relief to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum or involves an accounting by the trustee for all that he has done in pursuance of the trust, and the distribution of the trust moneys among all the beneficiaries who are entitled to share therein.' 1 Pom. Eq. Jur. § 158.

"In cases where the equity doctrine of trusts has been extended so as to embrace other relations of a fiduciary kind, while it may not be said that a court of equity possesses exclusive jurisdiction, yet it is well settled that in such case there is so much of the trust character between the parties so situated that the jurisdiction of equity, though not exclusive, is acknowledged. 1 Pom. Eq. Jur. § 157.

"In *Foley v. Hill*, 2 H. L. Cas. 28, a question arose over that sort of relation which exists between a banker and his depositor, and it was held to be merely that of debtor and creditor. The court added, however, that, as between principal and factor, an equitable jurisdiction attached, because the latter partook of the character of a trustee, and that 'so it is with regard to an agent dealing with any property. * * * And though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction,' and therefore equity has jurisdiction.

"In *Marvin v. Brooks*, 94 N. Y. 71, it was held that an agent who had been intrusted with his principal's money to be expended for a specific purpose might be required to account in equity, and that upon such an accounting the burden was upon him to show that his trust duties had been per-

formed and the manner of their performance. The jurisdiction was placed upon the ground of a fiduciary or trust relation, and it was held that a court of equity had jurisdiction over trusts and those fiduciary relations which partake of that character, and in such cases the right to an accounting is well established; but it was held that the existence of a bare agency was not sufficient. It must be an agency coupled with some distinct duty on the part of the agent in relation to funds or some specific property.

"In 2 Story's Eq. Jur. 12th ed. it is stated, at § 975a, that in general a trustee is suable in equity in regard to any matters touching the trust.

"In *Oelrichs v. Spain,* 15 Wall. 211, 228, sub nom. *Oelrichs v. Williams,* 21 L. ed. 43, 44, the court remarked that there being an element of trust in the case, that element, wherever it exists, always confers jurisdiction in equity."

Jones v. Missouri-Edison Elec. Co., 144 Fed. 765.
Circuit Court of Appeals, Eighth Circuit.

After reviewing the relationship between the officers and directors of a corporation and the corporation and its stockholders, Judge Sanborn said (771):

"• • • It creates such a fiduciary relation as makes it inequitable for any of those who thus share in the common property to do anything to or with it for their own profit at the expense of others who have the same rights,"

and regarding jurisdiction in equity, he said (771):

"• • • Any sale of the corporate property to themselves, and disposition by them of the corporation or of its property to deprive the minority hold-

ers of their just share of it or to get gain for themselves at the expense of the holders of the minority of the stock, becomes a breach of duty and of trust which invokes plenary relief from a court of chancery."

Wheeler v. Abilene National Bank Building Co.,
159 Fed. 391.
Circuit Court of Appeals, Eighth Circuit.

Judge Sanborn said (393):

"The question which this case presents is: May the holder of the majority of the stock of a corporation make a sale to himself, unassailable in equity, of all the property of the corporation for its fair value, when he knows that that value is only five-sevenths of the amount which the corporation can obtain for it. It is not material to the determination of this issue whether the notice of the stockholders' meeting specified, or failed to state, that the question of the confirmation of the sale to Southworth would be there considered, or whether, or not the other proceedings of the defendants complied with the requirements of the law; and for the purposes of this decision it will be conceded, but it is not decided, that all the proceedings of the parties and of the corporation were in strict accordance with the forms of law. The objection to this sale lies deeper. It is that it was violative of the duty of a fiduciary.

A corporation holds its property in trust for its stockholders. The stockholders have a joint interest in the same property and in the same title. Community of interest in a common property or title imposes a community of duty and a mutual obligation to do nothing to impair either. It creates

such a fiducial relation as makes it inequitable for any of those who thus share in the common property to do anything to or with it for their own profit, to the detriment of others who have the same rights. *Jackson v. Ludeling*, 21 Wall. 616, 622, 22 L. Ed. 492; *Jones v. Missouri Edison Electric Co.*, 144 Fed. 765, 771; 75 C. C. A. 631, 637; *Booker v. Crocker*, 132 Fed. 7, 8, 65 C. C. A. 627, 628.

The holder of the majority of the stock of a corporation has the power, by the election of biddable directors and by the vote of his stock, to do everything that the corporation can do. His power to control and direct the action of the corporation places him in its shoes, and constitutes him the actual, if not the technical, trustee for the holders of the minority of the stock. He draws to himself and uses all the powers of the corporation. In effect he holds an irrevocable power of attorney from the minority stockholders to manage and to sell the property of the corporation, for himself and for them. Times, places, and notices of meetings of the directors and of meetings of stockholders become of secondary importance, because the presence, the vote, and the protest of holders of the minority of the stock are unavailing against the will of the holder of the majority. They can act and contract regarding the corporate property, they can preserve and protect their interests in it, only through him and through the courts.

This devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through him, the duty to exercise good faith, care, and diligence to make the property of the corporation produce the largest possible amount, to

protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. Any sale of the property of the corporation by him to himself for less than he could obtain for it from another, or any other act in his interest to the detriment of the holders of the minority of the stock, becomes a breach of duty and of trust, renders the sale or act voidable at the election of the minority stockholders, and invokes plenary relief from a court of chancery. *Jackson v. Ludeling,* 21 Wall. 616, 622, 22 L. Ed. 492; *Jones v. Missouri Edison Electric Co.,* 144 Fed. 765, 771, 75 C. C. A. 631, 637; *Burnes v. Burnes,* 137, Fed. 781, 790; 70 C. C. A. 357, 366; *McCourt v. Singers-Bigger,* 145 Fed. 103, 107, 76 C. C. A. 73, 77; *Pepper v. Addicks* (C. C.) 153 Fed. 383, 405; *Wardell v. Railroad Company,* 103 U. S. 651, 658, 26 L. Ed. 509; *Menier v. Hooper's Telegraph Works,* 9 Ch. App. Cas. 350, 352, 353; *Goodin v. Cincinnati & Whitewater Canal Co.,* 18 Ohio St. 169, 182, 183, 98 Am. Dec. 95; *Ervin v. Oregon Ry. & Nav. Co.* (C. C.) 20 Fed. 577, 580 Id., 27 Fed. 625, 632; *2 Story's Eq. Jur.* §§ 1261, 1262,; *Sage v. Culver,* 147 N. Y. 241, 247, 41 N. E. 513; *Farmers' Loan & Trust Co. v. N. Y., etc. R. R. Co.,* 150 N. Y. 410, 425, 430, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; *Hinds v. Fishkill, etc., Gas Co.* (Sup.) 88 N. Y. Supp. 954, 957; *Meeker v. Winthrop Iron Co.* (C. C.) 17 Fed. 48; *Sidell v. Missouri Pac. R. Co.,* 78 Fed. 724, 727, 24 C. C. A. 216, 219; *Barr v. N. Y., L. E. & W. R. R. Co.,* 96 N. Y. 444, 449, 451, 456; *Wright v. Oroville M. Co.,* 40 Cal. 20, 27; *Pondir v. N. Y., L. E. & W. R. R. Co.,* 72 Hun, 384, 390, 25 N. Y. Supp. 560; *Gregory v. Patchett,* 33 Beavan, 595, 607; *Meyer v. Staten Island Ry. Co.,* 7 N. Y. St. Rep. 245, 248. The rea-

son for this rule is the detriment to the holders of the minority of the stock from such sales and transactions, and not the benefit the holder of the majority derives therefrom. *Symmes v. Union Trust Co.* (C. C.) 60 Fed. 830, 865; *Memphis & Charleston R. R. Co. v. Woods,* 88 Ala. 641, 7 South. 108, 7 L. R. A. 605, 16 Am. St. Rep. 81. It is the duty of the master of the corporation who sells its property to procure the highest possible price for it (*Jackson v. Ludeling,* 21 Wall. 616, 625, 22 L. Ed. 492); and, if he sells it to himself for less, the sale is voidable by the holders of the minority of the stock at their option, although he paid the fair market value for it. *Miller v. Brown,* 1 Neb. (Unof.) 754, 95 N. W. 797."

Davis v. Pearce, 30 Fed. (2d) 85.
Circuit Court of Appeals, Eighth Circuit.

Judge Booth said (88):

"It is unquestionably the law that the directors of a corporation occupy a fiduciary relationship to the corporation and its stockholders. In the management of the corporate affairs, the directors are required to act in the utmost good faith. They are not allowed to make a personal profit at the expense of the corporation or its stockholders. Where they have entered into a transaction in violation of these principles, and a profit has been made, equity will compel them to account therefor to the corporation. The books are full of cases involving the application of these principles to many different states of facts. Many such cases have been cited, among them the following (cases cited).

"They have all been thoughtfully considered. From the numerous authorities there may be deduced the following tests to be applied where the

conduct of a director of a corporation is called in question in a court of equity: Do the actions or omissions show a lack of the highest good faith on the part of the director toward the corporation and the stockholders? Has the director made for himself out of a transaction a profit which by proper effort on his part could have been obtained for the corporation?"

Moon Motor Car Co. v. Moon, 58 Fed. (2d) 90.
Circuit Court of Appeals, Eighth Circuit.

An action at law was brought by the Motor Car Company against its officers for moneys claimed to have been wrongfully taken by them from its treasury under the guise of salaries. At the close of plaintiff's case, the court, upon motions, instructed verdicts for defendants. Upon appeal, the judgment was reversed and it was held that the remedy was in equity. Judge Kenyon said (92):

"If this action had been one for an accounting, as it apparently should have been, *Providence Min. & Mill. Co. v. Nicholson et al.* (C. C. A.) 178 F. 29; *Davenport Oil Co. v. Davenport* (C. C. A.) 23 F. (2d) 191, the evidence would seem sufficient to call for explanation from defendants and some proof of their authority to draw this money from the treasury of plaintiff."

And again (93):

"We think this case should have been brought on the equity side of the docket. If we were satisfied, however, that the result reached at law was correct and the same as should be reached in equity, it would be useless, of course, to reverse the judgment and remand it for a trial in equity."

The Court of Appeals held that the result reached at law was not correct, reversed the judgment and remanded the case with directions that it be tried in equity.

Wile et al. v. Burns Bros., et al., 2 Fed. Supp. 950. District Court, Southern District of New York.

Judge Coxe cited and quoted from the opinion of Mr. Justice Hatch in *Mabon v. Miller*, 80 N. Y. S. 979 (984) in which the grounds of equitable jurisdiction are cogently stated (951):

"* * * It is no objection to the complaint that the defendants may not be all equally culpable, or equally liable to respond in damages or otherwise to account for the property which has been misappropriated. * * * There may be many breaches, but they are of a single duty. There may be different trustees, but they deal with the same matter. There may be different degrees of participation in the disposition of the property, but the dealings are had with the property of the corporation, and the duty in such dealing is owed by the trustee to it. Consequently, the act which furnishes the ground of action is the breach of duty; and an accounting is asked of the property affected by such breach, together with the damages which flow therefrom. The whole cause of action is, therefore, single; and the fact that all of the directors may not have acted at a given time, or have been guilty of the same waste, or involved in the same measure of damage inflicted upon the corporation, is of no consequence. To the extent that they have been guilty of wrongful acts whereby property has been dissipated, for such acts and property they may be called upon to account; and variance in degree of acts, or culpability, or property wasted, or damage

sustained, does not make different causes of action. Equity lays hold of the entire transaction, and is invested with power in a single equitable action to submit each and every action of the directors to scrutiny, and award such judgment as is consonant with the facts and will remedy the wrong, and may determine therein the liability of each director for his culpable act."

Bosworth v. Allen, 168 N. Y. 157; 55 L. R. A. 751; 61 N. E. 163.
Court of Appeals of New York.

The defendants, Allen and others, were officers and directors of a Loan Association and Allen was also its attorney. Without the knowledge or consent of the stockholders, the defendants conspired with White and others to elect them as directors of the corporation. In consideration of this agreement, White and his associates were to pay defendants for their stock a sum in excess of its value, were to have the corporation employ Allen as its counsel for a period of time, and were to pay the defendants a bonus of about $18,000. The agreement was carried out. White and his associates were elected directors and officers of the corporation. The defendants' stock was purchased at the agreed price, Allen was retained as counsel and the bonus was paid defendants. Under what was claimed to be the mismanagement of the corporation by White and his associates, the corporation sustained losses. The corporation later repudiated the contract employing Allen as its counsel but he insisted that it still remained in effect. A bill was filed by the corporation against Allen and the former officers and directors who had entered into this agreement with White and his associates. It charged the facts above stated. The re-

lief sought was a cancellation of the contract under which Allen was retained as the corporation's counsel, an accounting and payment of all moneys received by the defendants on account of the transactions complained of, and an ascertainment of the damages suffered by the corporation on account of the wrongful acts of the defendants. The defendants demurred on the ground that the bill set forth several causes of action, some in contract and some in tort, for some of which at least there was an adequate remedy at law. The court below sustained the demurrers. The court of appeals reversed in an opinion by Justice Vann, in which he said (761):

"The defendants conspired to wreck the corporation of which they were directors, and to thereby make money for themselves. Although they sustained a relation of trust to the corporation, and were bound to promote its interests and protect its property, they entered into a combination to destroy it in order to enrich themselves. While not technically trustees, for the title of the corporate property was in the corporation itself, they were charged with the duties and subject to the liabilities of trustees. Clothed with the power of controlling the property and managing the affairs of the corporation, without let or hindrance, as to third persons they were its agents, but as to the corporation itself equity holds them liable as trustees. (Authorities cited). While courts of law generally treat the directors as agents, courts of equity treat them as trustees, and hold them to a strict account for any breach of the trust relation. For all practical purposes they are trustees when called upon in equity to account for their official conduct. (Cases cited).

The corporation itself had the right to call the directors to account, and such was originally the form of the action before us; but since the trial

a receiver has been appointed and substituted as plaintiff herein. While detached portions of the complaint, when read by themselves, would support several causes of action, when all the allegations are considered together we find but two,—one an action against trustees, or those liable as trustees, for an accounting; and another, incidental thereto and consistent therewith, arising out of the same transaction, and belonging to the same class, to wit, an action to set aside a written contract entered into through the defendants, as trustees, pursuant to the same fraudulent conspiracy upon which the main cause of action is founded. Both rest upon the same equitable principle, although one depends upon a single overt act and the other upon many, committed in carrying the conspiracy into effect. That principle is that the directors of a corporation are charged with the duties of trustees and bound to care for its property and manage its affairs in good faith, and for a violation of that duty, resulting in waste of its assets, injury to its property or unlawful gain to themselves, they are liable to account in equity the same as ordinary trustees. The corporation has the right to call upon them to account, not only for all the property intrusted to their care, but also for all moneys furtively made by them at its expense. It is the peculiar province of courts of equity to supervise the execution of trusts, and to call trustees to an accounting for their management of trust estates, and especially for every violation of their primary duty not to deal with trust property for their own advantage. *Hiscock v. Lacy,* 9 Misc. 578, 30 N. Y. Supp. 860; *Husted v. Thomson,* 158 N. Y. 328, 335, 53 N. E. 20. Equitable jurisdiction extends to all culpable acts and omissions of the directors by which the pecu-

niary interests of the corporation are or may be injured. If they are treacherous to its interests, and appropriate its property, or intentionally waste its assets, or take money for official action, or 'sell out' by resigning, and thus giving control to others, they are liable to account in equity to the corporation or its representatives, not only for the money or property in their hands, but also for such as they fraudulently disposed of or wasted, as well as for the damages naturally resulting from their official misconduct; and even, as we have recently held, for money received by virtue of their office. *McClure v. Law*, 161 N. Y. 78, 55 N. E. 388. A court of equity has power, at the instance of the proper party, through its flexible and comprehensive action for an accounting, to inquire into every official act of the officers and directors, and, testing them by the standard of good faith and the absence of gross negligence, to compel restitution of property withheld, with compensation for assets wasted, and to award damages for the natural consequences of official misconduct, when such damages are claimed, in connection with equitable relief, on account of a general course of injurious action or a conspiracy to despoil the corporation. Even if part of the relief could be had in actions at law, still, when it is sought in connection with strictly equitable relief, such as the discovery of trust property and the recovery thereof, and the right to all relief springs from a common cause, such as a conspiracy, all may be included in the sweeping action for an accounting.

* * * * * * * *

"* * * The value of the assets wasted and the amount of expense incurred as the direct and natural result of the conspiracy must be accounted for

by the defendants, because those assets were intrusted to their care and protection as trustees, and, having broken their trust, they are liable for all the proximate consequences. Through an action for an accounting a court of equity has power to discover and fix the value of all assets improperly withheld pursuant to the conspiracy, and of all property lost and damages caused by the wrongful acts of the defendants, and to compel them jointly and severally to pay the aggregate amount over to the plaintiff. Through the conspiracy, and the overt acts in execution thereof, the defendants violated their duty as trustees, and equity will award complete relief in a single action for all the consequences of such violation, even if a part thereof might be had in an action at law. While the *cestui que* trust may sometimes proceed at law against his trustee, he need not do so, but may always call him into a court of equity. That course was pursued in this case, and the entire complaint, although verbose and inartificial in form, is simply an action to compel trustees to account, except so far as it seeks to set aside a written contract entered into between one of the defendants and the corporation in partial execution of the conspiracy, whereby assets were to be wrongfully diverted to him. All the defendants are responsible for that contract, for it was part of the fraudulent confederation into which they all entered. It was part of the wrong intended and accomplished by them. The cause of action to set it aside was properly united with the cause of action to compel the defendants to account for the injurious results of the arrangement of which it was a part. Both causes of action were founded upon claims against trustees arising by operation of law. Code Civ. Proc. § 484, Par. 8.

The fundamental fact upon which the right to all relief rested was the conspiracy entered into by the trustees against the corporation to do or aid in doing all the acts complained of. All the injuries charged result from the overt acts of the defendants pursuant to and in execution of the conspiracy. As all stand on that common ground, all were affected by each cause of action, although not equally. All were proper parties, and the cancelation of the contract was relief appropriate and incidental to the main object of the action, which was to compel trustees to account for official misconduct, and make restitution of property withheld, with compensation for property wasted and expenses necessarily incurred to prevent further injury. In a single equitable action the court may go to the bottom of the wrong, and work out, in such form as the facts require, all the relief called for by the conspiracy of the defendants against the corporation towards which they stood as trustees."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. [redacted] 15

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation,
Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

BRIEF OF RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. 831

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

BRIEF OF RESPONDENTS.

I.

COUNTER STATEMENT OF MATTERS INVOLVED.

(A) Statement of Facts.

Respondents accept the statement of facts as set forth in the petition as being, in the main, correct, except for the following corrections therein or amplification thereof:

Each of the proofs of claim presented to the Special Master by the Respondents is a claim *ex contractu* (R. pp. 4, 6, 11, 15 and 79), while each cause of action set forth in the so called ancillary bill against the Respondents is an action *ex delicto*. The sole relief sought

against each of the Respondents is a decree *in personam* for the payment of moneys. Accountings are only sought for the purpose of ascertaining the damages alleged to have been sustained by reason of the alleged unlawful acts of Respondents. The alleged wrongful acts and the relief sought are as follows:

One. The taking of moneys by Respondents, Hillman, Sheets and Watson, during the period from May 1920 to October 1933 under the guise of salaries as officers of Tower Hill Connellsville Coke Company of West Virginia (hereinafter called "Tower Hill"), Tower Hill Connellsville Coke Company of Pennsylvania (hereinafter called "Tower Hill of Pennsylvania"), and Eastern Coke Company (hereinafter called "Eastern"), (R. pp. 50 and 51). The relief sought is a decree for an accounting and payment of these moneys by Respondents (R. p. 62).

Two. The purchase of 11,840 shares of capital stock of Emerald Coal and Coke Company, for which the sum of $1,184,000.00 was paid by Tower Hill on the ground that the expenditure of said funds was a misappropriation of the moneys and assets of Tower Hill made for the monetary gain and advantage of Hillman and constitutes mismanagement of the corporate affairs of Tower Hill of a fraudulent character. (R. pp. 51-53). The relief sought is a decree against Respondents, Hillman, Sheets and Watson and each of them for the payment of the sum of $1,184,000.00, with interest on the surrender by the Petitioners of the said shares of stock. (R. pp. 62 and 63).

Three. Improvident and fraudulent waste and misappropriation of the funds of Tower Hill, Tower Hill of Pennsylvania and Eastern by means of a pool arrangement by which the Respondent, Hillman Coal and Coke Company, apportioned and allocated certain office, over

head and engineering expense among various corporations with which it was connected or affiliated, including the said three named companies, and the operation of Tower Hill and its said subsidiaries as mere departments of Hillman Company, in consequence of which wrongdoing, negligence and failure Tower Hill and its said subsidiaries lost large sums of money. (R. pp. 53-57, inclusive). The relief sought is that the Respondents, Hillman, Sheets and Watson and Hillman Coal and Coke Company account for all moneys received and retained by Hillman Company from Tower Hill and its said subsidiaries, by reason of the said pool arrangement, for all coke produced and manufactured from the property of Tower Hill and its subsidiaries during the period from April 1920 to October 1933, and the proceeds of said sale or other disposition thereof, and that the Respondents and each of them be decreed to pay to Petitioners, all such moneys as upon said accounting may be adjudicated to be due and owing to Tower Hill or the Petitioners. (R. p. 63).

Four. The exchange by Tower Hill of Pennsylvania of 178.4 acres of coal to Redstone Coal and Coke Company for property known as Thompson-Connellsville No. 1 Plant of Redstone, which is alleged to have been caused by Hillman through his control of Tower Hill of Pennsylvania, for the purpose of benefiting Hillman and Hecla Coal and Coke Company, Respondent, and grossly improvident expenditures in taxes, maintenance and improvements of Thompson-Connellsville No. 1 Plant brought about by the fraud of Hillman, Sheets and Watson in imposing said property on the Tower Hill of Pennsylvania. (R. pp. 59-62). The relief sought is that Respondents, Hillman, Sheets and Watson and Hecla Coal and Coke Company and each of them be decreed to pay to Petitioners, the sum of $356,800.00, with interest, the

alleged value in cash of the 178.4 acres traded by Tower Hill of Pennsylvania with Redstone in exchange for the said Thompson-Connellsville No. 1 property, upon conveyance by Petitioners of said property to such person or persons as the Court may direct and for an accounting for all moneys expended for taxes upon and the operation and maintenance of said property, and the repayment to Petitioners of all such sums, less such moneys as have been received heretofore by Tower Hill and/or Tower Hill of Pennsylvania for coke produced or manufactured from the said Thompson-Connellsville No. 1 property. (R. pp. 63 and 64).

On presentation of the so called ancillary bill, the Court ordered the same to be filed, with leave to the defendants therein named, however, to move to dismiss, to answer, or make such other defense thereto as might be proper, the order reciting:

> "4. All questions as to the jurisdiction of this Court and other questions are reserved by this Court for future decision as such questions may arise, and nothing is herein decided except that the bill shall be filed and notice thereof be had as directed above". (R. p. 22).

(B). History of Case In Lower Courts.

Upon the affirmation of the decree of the District Court in the case of *Piedmont Coal Company, et al. v. Tower Hill Connellsville Coke Company of West Virginia*, adjudicating that its business and affairs be terminated and wound up, its property and assets sold and converted into money and distribution made to its creditors and stockholders and appointing the Petitioners Receivers for said purpose, with full power to institute and prosecute either in their own name or through Ancillary Receivers all suits necessary to recover possession

of all and singular of the said property and assets, an Order of Reference was thereupon made to a Special Master to ascertain the creditors and stockholders of Tower Hill and their respective rights and priorities. (R. p. 1).

The Respondents, none of whom were parties to the original cause, or had intervened therein, pursuant to the said Order of Reference, at a hearing held by said Special Master appeared and presented their Proofs of Claim, four of them as creditors and the fifth as a stockholder, and certain testimony was taken on some of said claims. Each of said claims remains pending and undetermined. (R. p. 79).

Thereupon the Receivers of Tower Hill, Petitioners, tendered and asked leave to file the so called ancillary bill of complaint against the Respondents (R. p. 46), wherein they set forth that at the said hearing held before the Master, the Respondents had each appeared and made proof of their said claims, setting forth also the nature and amounts thereof, and denied the validity of said claims and alleged that they had certain claims against each of the Respondents, the nature of which has been already stated in the counter statement of facts. Each of said claims set up by the Receivers is, as heretofore stated, a claim for money damages arising out of an alleged cause of action *ex delicto*. Most of the said causes of action, as Northcott, J. in his opinion says appear not to have grown out of transactions which were the basis of claims filed by the Respondents with Receivers, but constitute independent claims in behalf of the Receivers against the claimants. (R. p. 79). Each of the prayers of the said bill was a prayer for affirmative relief against the Respondents on the causes of action therein asserted against them, which constitute counter claims to the claims filed with the Receivers and not mere defenses thereto, (R. p. 80), and all of said alleged

causes of action constitute causes of action at law upon which the Respondents have the right of trial by jury and are not cognizable in equity, as Petitioners assume. The Respondents thereupon appeared specially by their attorneys for the sole purpose of raising the question of the jurisdiction of the Court and none other, and moved to vacate the said order directing that the said bill be filed and to quash the service thereof upon them, on the ground that each of the individual Respondents was at the time of the filing of the said suit and always since has been a citizen and inhabitant of the Commonwealth of Pennsylvania and a resident of the City of Pittsburgh, Allegheny County, in said Commonwealth and each of the corporate Respondents is a corporation incorporated and existing under the Laws of the Commonwealth of Pennsylvania, with its domicile in the City of Pittsburgh in said Commonwealth, and a citizen, resident and inhabitant of the said Commonwealth within the purview of Section 51 of the Judicial Code of the United States (U. S. Tit. 28, sec. 112) with respect to venue. (R. p. 21) In the proceedings entitled No. 3370 in Equity in the said District Court, to which Number the said ancillary bill is filed, each of said Respondents also appeared specially, for the sole purpose of questioning the jurisdiction of the Court and moved to quash the service of and dismiss the said bill for want of jurisdiction on the same ground as that alleged in the motion to vacate the Order of Court filed in this case directing that the said bill be filed.

The District Court held that as the said bill was for the purpose of collecting large sums of money from the Respondents that the Court had no jurisdiction over the Respondents to grant the affirmative relief prayed for therein and entered a decree sustaining Respondents' motion to vacate its order in this case directing

the bill to be filed (R. p. 25), and also entered a decree in the case at No. 3370 in Equity, dismissing the said ancillary bill.

Upon appeals taken by the Receivers from each of said decrees, the Circuit Court of Appeals held that both appeals presented the same question, viz., the correctness of the order dismissing the bill (R. p. 80) and further held that the District Court was correct in holding that it had not acquired jurisdiction to award any affirmative relief thereon against the Respondents. The Circuit Court of Appeals, however, held that the District Court did have jurisdiction to pass upon any defense, legal or equitable, which might be asserted against the claims filed with the Receivers and to stay action upon those claims until the counter-claims asserted in the ancillary bill could be adjudicated in a court of competent jurisdiction, so that they could be set off against the claims, or the amounts payable thereunder. (R. p. 85).

The Court in its opinion says

"We think, therefore, that, instead of dismissing the ancillary bill, the court below should have retained it, treating it as a petition to stay action on the claims until the counter-claims therein asserted could be adjudicated in a court of competent jurisdiction, and as setting up defenses to the claims in the cases where the matters alleged could be considered as purely matters of defense as distinguished from counter-claims. The order appealed from will accordingly be modified and the cause will be remanded to the end that the court below may give consideration to the question of staying action on the claims pending the adjudication of the counter-claims in a court of competent jurisdiction, and that it may consider any matter set up in the bill which may appropriately be considered as matter of de-

fense against the claims filed. The court should require, however, that new pleadings be filed in lieu of the ancillary bill, setting up as against each claim filed with the receivers any purely defensive matter which the receivers may desire to assert, together with any matter which would justify the court in staying action on the claims pending the adjudication of any counter-claim or counter-claims in a court of competent jurisdiction." (R. p. 85).

The opinion of the Circuit Court of Appeals is reported in 75 Fed. (2nd) p. 451, Advance Reports.

(C) Statement of Question Presented.

Where a Federal District Court which has appointed Receivers to wind up the affairs of a solvent corporation appoints a Master under an Order of Reference to receive Proofs of Claims of creditors and stockholders, and where non-resident claimants, not parties to the Primary Cause, pursuant to said Order, appear before said Master and present their Proofs of Claim, does such action make them parties to said Primary Cause and subject them to the jurisdiction of said Court in a proceeding thereafter instituted by the Receivers against them in said Court on a Bill of Complaint wherein the Receivers seek affirmative relief to recover money damages on alleged causes of action sounding in tort?

II.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Respondents submit that the reasons relied on by Petitioners for allowance of this writ are insufficient to warrant this Court in the exercise of its discretion to grant the same.

Respondents further submit that their counter-statement of the question presented is a more accurate statement thereof than that contained in the Petitioners' brief as appears from the following excerpt from the opinion of Northcott, J.:

> "The question involved is not one as to the jurisdiction of the court over the causes of action asserted in the ancillary bill, for it is well settled that the courts of the United States have jurisdiction to entertain, either in equity or at law as may be appropriate, ancillary proceedings in aid of a receivership suit pending in a federal court, even though other elements of federal jurisdiction, such as diversity of citizenship or the jurisdictional amount, may be lacking. *White v. Ewing,* 159 U. S. 36; *Pope v. L. N. & A. C. R. Co.,* 173 U. S. 573; *Kirkland v. Knox,* 230 Fed. 860; *Carey v. McMillan* (C.C.A., 8th); 289 Fed. 380; *Hart v. Wiltsee,* 19 Fed. (2d) 903; *Hume v. City of New York,* 255 Fed. 488; *Peck v. Elliott,* 79 Fed. 10. *The question is whether the court acquired such jurisdiction over the persons who filed claims with the receivers as would authorize the granting of relief against them on counter-claims on which affirmative personal relief was asked and which were not mere defenses to the claims filed; and we think it clear that this question must be answered in the negative.*" (R. pp. 80 and 81).*

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* Italics ours throughout this brief unless otherwise noted.

The Petitioners assign three reasons for the allowance of the writ, viz.

(a) The question at issue in this case has never been decided in this Court.

(b) It affects materially the prompt and equitable administration of Receivership estates; and

(c) It involves the application of Equity Rule 30.

(a) THE NOVELTY OF THE QUESTION.

The question reduced to a very narrow compass may be adequately paraphrased as follows:

Must an inhabitant of the State of Maine forego filing his claim as a creditor of a corporation for whom a Receiver in a Federal District Court in Equity in the Southern District of California has been appointed, for fear that the California Court will assume jurisdiction over him in any suit which its Receiver may thereafter see fit to institute against him, on the ground that by filing his claim he has waived his right under Section 51 of the Judicial Code (U.S.C.A. Title 28, Sec. 112), to be sued in the District of Maine where he is an inhabitant?

That the precise question here involved may not have been decided by this Court is not necessarily a reason for its consideration now. On the contrary, this fact raises a presumption that during the long period in which receivership cases in great number have been prosecuted in the Federal Courts no one has considered tenable the contention of the Petitioners herein. And adjudications of the controlling principles, supporting the action of the District Court and the Circuit Court of Appeals herein, are found in the decisions of this and other courts of the United States in considerable and sufficient number.

The Circuit Court of Appeals clearly states the position of the Petitioners in this case as follows:

"The position of appellants is that these persons made themselves parties to the original cause by filing claims before the special master, and that no further service of process upon them, or consent to jurisdiction on their part, was necessary to give the court jurisdiction to award relief against them on the ancillary bill." (R. p. 81).

The Court also makes the following answer thereto:

"The answer to this, however, is that under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause. *Elkins v. First Nat. Bank of the City of New York* (C.C.A. 4th) 43 Fed. (2d) 777; *Acme White Lead & Color Works v. Republic Motor Truck Co.*, 285 Fed. 88; *Jones v. Laughlin & Sands* (C.C.A. 2d) 79 Fed. 913; *Youtsey v. Hoffman*, 108 Fed. 693; *Sands v. Greeley Co.*, 80 Fed. 195; Clark on Receivers, Vol. 1, p. 717." (R. p. 81.)

(b) THE EFFECT OF THE DECREE COMPLAINED OF UPON THE PROMPT AND ORDERLY ADMINISTRATION OF EQUITY RECEIVERSHIP ESTATES.

In answer to this contention, we respectfully submit:

(1) Such a reason is not sufficient to warrant the Court in disregarding the provisions contained in Section 51 of the Judicial Code (U.S.C.A. Title 28 Sec. 112) which, subject to the exceptions therein set forth, none of which are applicable to this case, prohibits suits from being brought in any District Court against any person by an original process or proceeding in any other district than that whereof he is an inhabitant.

(2) The prompt and orderly administration of an equity receivership estate is no more affected or interfered with by a suit brought against a non-resident defendant in a district whereof he is an inhabitant than is a suit, whether at law or in equity, in the District Court wherein the receivership estate is being administered. In each case the defendant is entitled to his day in Court and the case takes its course without regard to the administration of the Receivership. Particularly is this true where the defendant has the right to a trial by jury.

(3) In the case at bar the Circuit Court of Appeals has made adequate provision to the end that the orderly administration of the receivership may be effected and the rights of all parties interested therein preserved by modifying the decree of the District Court and decreeing that the Ancillary Bill be treated as a petition to stay action on the claims of the Respondents pending the adjudication of the counter-claims of the Receivers in a Court of competent jurisdiction.

(c) THE APPLICATION OF EQUITY RULE 30.

A complete answer to the Petitioners' claim that the question at issue involves the application of Equity Rule 30 is found in the following excerpt from the opinion of Judge Northcott:

> "The case is said to be analogous to a suit in equity in which the complainant, by filing the suit against the defendant, impliedly consents to being sued by way of counter-claim in a court which would not otherwise have jurisdiction of the cause of action therein asserted. See Equity Rule 30; *Texas Co. v. Borne Scrymser Co.* (C.C.A. 4th) 68 Fed. (2d) 104; and *General Electric Co. v. Marvel Rare Metals Co.* 287 U. S. 430, in the last of which the Supreme Court said: 'The setting up of a counter-

claim against one already in a court of his own choosing is very different, in respect to venue, from haling him into that court.'

"One filing a claim with a receiver, however, is in a very different position from one who has filed a bill in equity. He is not in a court of his own choosing, but in a court selected by others, which has taken into its possession the only property from which he can obtain payment of his claim. The complainant who files a bill in equity, and thus subjects himself to equitable counterclaims of the defendant, has had the option of going into either the state or federal courts and of suing in any district in which jurisdiction of the defendant can be obtained. The claimant who files claim with a receiver, on the other hand, has had no option whatever. Unless he promptly files his claim with the court which has taken jurisdiction of the property, his right to share in the distribution of that property will be gone; and that court passes upon his claim, without regard to citizenship, the amount involved, or other jurisdictional requirements, merely because of the necessity arising out of the fact that it has taken possession of property. The claimant in such case files his claim in the receivership suit in order that he may obtain his equitable portion of the property in receivership upon its distribution by the court; and, as we said in a former opinion herein, he makes himself a party to the cause *pro hac vice,* i. e., merely for the purpose of having his claim allowed and of sharing in the distribution of the property in which he claims an interest because of the receivership. He has an equitable interest in the property which is in the hands of the receiver; and his position, in so far as coming into the receivership suit for the assertion of his

rights in concerned, is more nearly analogous to that of a person whose property has been attached, and who must appear and defend for the protection of his interest in the property, than to that of a complainant who has voluntarily gone into a court and filed a bill in equity. To permit the receiver to assert in the receivership suit an independent cause of action at law or in equity against such claimant, or to recover on a counterclaim against him merely because he has filed his claim in the receivership suit, would be as unfair as to permit a plaintiff in an attachment suit to amend his complaint to allege a new and different cause of action against a defendant in attachment, or to permit a non-resident, who has appeared to defend a suit on one cause of action, to be subjected while in the jurisdiction to suit on another and independent cause of action. It is well settled that, in an attachment suit, it is not permissible to amend the pleadings to set up a new cause of action (6 C. J. 482), and that one who comes into the jurisdiction of a court for the protection of his interest in litigation there pending is immune from service of process in another suit. *Page Co. v. McDonald,* 261 U. S. 446; *Stewart v. Ramsey,* 242 U. S. 128." (R. pp. 83 and 84).

Further, as Judge Northcott in his opinion says, and an examination of the ancillary bill discloses, the causes of action alleged therein are not cognizable in equity, but constitute causes of action at law, and Equity Rule 30 has no application thereto.

III.

ARGUMENT.

(1) The Issue Involved In Its Last Analysis Resolves Itself Into One of Venue.

Section 51 of the Judicial Code (U. S. C. A. Title 28, Sec. 112), contains the following provision:

> "'(a) Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant;"

The exceptions to the prohibition upon bringing any person before a District Court by any original process or proceding in any other district than that whereof he is an inhabitant, as found in Sections 52 to 57, both inclusive, of the Judicial Code, (U. S. C. A. Title 28, Secs. 113 to 118), do not apply to a proceeding such as the one now before the Court, for the reason that the so-called Ancillary Bill does not affect any property within the Southern District of West Virginia, no real property within the said territorial district is mentioned in the said Bill and the proceeding is not in the nature of an attachment of any property of Respondents within said district.

(2) The Proving of Claims Before a Special Master to Whom an Order of Reference Has Issued in a Receivership Proceeding Does Not Make the Claimant a Party to Such Receivership Proceeding.

As stated by Judge Northcott in his opinion:

"* * * under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause. *Elkins v. First Nat. Bank of the City of New York* (C. C. A. 4th), 43 Fed. (2d) 777; *Acme White Lead & Color Works v. Republic Motor Truck Co.*, 285 Fed. 88; *Jones v. Laughlin & Sands* (C. C. A. 2d) 79 Fed. 913; *Youtsey v. Hoffman*, 108 Fed. 693; *Sands v. Greeley Co.*, 80 Fed. 195; *Clark on Receivers*, vol. 1, page 717." (R. p. 81)

(3) The Ancillary Bill is Not a Purely Dependent Bill. It is an Original Bill Against the Respondents and Hence Requires the Service of Original Process.

No argument is necessary in support of the proposition that the issues involved in the Primary Cause at No. 1434 in Equity, wherein the Piedmont Coal Company, et al., are Plaintiffs and the Tower Hill Connellsville Coke Company of West Virginia is Defendant, and the issues involved in the Secondary Cause at No. 3370 in Equity in the District Court wherein the Petitioners are Plaintiffs and the Respondents Defendants are essentially different. The Bills therein filed are against different parties and the Respondents, Defendants in the Bill at No. 3370 in Equity, were not parties to the Bill at No. 1434 in Equity. In the latter case, 64 Fed. (2d) 817, the Court held that for the purposes of the decree, Tower Hill of West Virginia was the only indispensable

party. The issues in the two cases are entirely different. In the case at No. 1434 in Equity the fundamental issue was whether the rights of the preferred stockholders were so imperilled by the management of the defendant company as to warrant the appointment of a receiver to wind up its affairs. The issues raised by the Bill at No. 3370 in Equity are whether the individual Respondents, Hillman, Sheets and Watson and the two Respondent corporations are liable to Tower Hill in damages by reason of their dealings with it. The causes of action alleged in said Bill are not only the acts of fraud and mismanagement averred in the former Bill but are based on other actions not theretofore complained of.

Northcott, J., in his opinion says:

"And where an ancillary bill, as does the bill here, brings in new parties to the original suit and charges new matter as a basis of relief, the proceeding as against such new parties is an original, not an ancillary, proceeding, and they must be properly served with process to give the court jurisdiction. *Dunn v. Clark,* 8 Pet. 1; *Smith v. Norfolk,* 115 U. S. 143, 148; *G. & C. Merriman Co. v. Saalfield,* 241 U. S. 22; *Manning v. Berdan,* 132 Fed. 382; *Bowers v. Christian,* 16 Fed. 729; *Hart v. Wiltsee, supra.*" (R. p. 81.)

(4) Respondents Are Not Amenable to the Service of Process of the Ancillary Bill Under Section 51 of the Judicial Code.

(a) The right of a defendant to be sued in his own district in any civil suit is absolute. In *Munter v. Weil Corset Co.*, 261 U. S. at 279, 67 L. Ed. 654, this Court says:

> "The service on Munter was void. *The district court of Connecticut had no power to send its process to New York for service. Toland v. Sprague,* 12 Pet. 300, 330, 9 L. Ed. 1093, 1105; *Herndon v. Ridgway,* 17 How. 424, 15 L. Ed. 100; *New York L. Ins. Co. v. Bangs,* 103 U. S. 435, 26 L. Ed. 580."

(b) Respondents have not waived their personal privilege to be sued in the district whereof they are inhabitants.

The personal privilege of a non-resident defendant to insist upon suit being brought against him and the service of process upon him in the district whereof he is an inhabitant may only be waived if he appears and pleads to the merits of the *particular* bill or suit in which he is named defendant.

Grable v. Killits, 282 Fed. 185, 195;
Citizens Savings & Trust Co. v. Illinois Central Railroad Co., 205 U. S. 46, 51 L. Ed. 703;
Big Vein Coal Co. of W. Va. v. Read, 229 U. S. 31, 57 L. Ed. 1053;
Pacific Mutual Life Ins. Co. v. Tompkins, 101 Fed. 539 (C. C. A. 4th Cir.).

Respondents insist, moreover, that they were not, as Petitioners contend, "actors" in any sense of the word at any time in any of the proceedings which were insti-

tuted in the Court below. The presentation of the Respondents' claims to the Special Master was by virtue of the Order of the Court directing them, among other creditors and stockholders, to submit their claims to the Master within a very limited time under penalty of thereafter being barred from participating in the distribution of the assets of the defendant corporation. They were in this respect not movants but persons who, by virtue of the Court's order, were in a position analogous to that of a defendant against whom suit is brought and who must appear and defend to prevent a judgment in default. The order compelled them to file their claims, with proof thereof, before the Special Master, at the place and time designated by him or forfeit the same.

The answer to the Petitioners' argument that Respondents were in a Court "of their own choosing" and therefore that the cases of *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430; 77 L. Ed. 408; *Thames & Mersey Marine Insurance Co. v. United States*, 237 U. S. 19; 59 L. Ed. 821 and *Burnrite Coal Briquette Co. v. Riggs*, 274 U. S. 208; 71 L. Ed. 1002, are applicable is conclusively stated by Northcott, J., in his opinion, (R. pp. 83 and 84) from which we have already quoted, (pages 13 and 14 hereof).

The following language from *Read v. Neff, et al.*, 207 Fed. 890, is particularly appropriate.

> "This court is open to all litigants who can make averment of jurisdictional facts. He had the perfect right to come to this court and look after his case, aid in the management thereof and give his testimony. This is not denied. ***But it is contended that if he did elect to come, he must come with a club over his head, terrorizing both him and all***

> *other litigants of like position. This is unsound and utterly at variance with the undoubted right of all such litigants to personally present their case, either alone or with the aid of lawyers. And, if litigants coming from another state come at the peril of being sued, many would not come."*

Petitioners would extend the appearance of these Respondents before the Special Master *pro hac vice* to a general appearance entered in the District Court in any and all cases that the Petitioners might see fit thereafter to bring against them. They would make the filing of the proofs of claim before the Master operate as a blanket waiver of Respondents' privilege to immunity from service of process before they knew that they might at some future date be placed in a position where they should avail themselves of their right. We submit that the Respondents may not be so lightly divested of their right and that this Court will look with no more favor than did either the District Court or the Court of Appeals on the Petitioners' contention.

(c) Equity Rule No. 30 has no application.

The same reasoning that denies the contention that parties filing claims with a receiver or before a master upon a reference make themselves parties to the original cause, refutes the contention (Petitioners' brief p. 11) that such claims "are in essence bills in equity." A reference to a master for the purpose of ascertaining the parties entitled to the proceeds realized upon the winding up of a corporation is merely a part, and only a part, of the process of execution of the final decree in the original suit, and the filing of claims, which must be filed to preserve the claimant's rights, whether his claims are legal or equitable, presents no analogy to the bringing of

a suit in equity. The claimants are brought into a forum not of their selection, for a special and limited purpose, upon penalty of forfeiting their claims by non-appearance, and are compelled to prosecute such claims in a court of equity without regard to whether such claims be legal or equitable in their nature. They have no choice in respect of either procedure or forum. We believe that the opinion of Northcott, J., and what has been hereinbefore said fully answers the Petitioners' argument on this point.

Moreover, this Court has repeatedly held in a long line of cases that Equity Rule 30 was not intended to change in any respect the line of demarcation between law and equity, as drawn by the Federal Statutes and Decisions. That such is the law clearly appears from that omitted portion of the opinion of the late Chief Justice Taft in *American Mills Co. v. American Surety Co. of New York,* 260 U. S. 360, at 364, 67 L. Ed. 306, at 309 from which Petitioners have quoted (Petitioners' Brief p. 10) in their effort to show that Equity Rule 30 should be invoked in this case. We give in italics the omitted portion of said paragraph which is indicated by asterisks in the Petitioners' Brief, in the following quotation from Chief Justice Taft's opinion:

> "The new Equity Rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence, and by uniting in one action as many issues as could conveniently be disposed of. *But they normally deal with subjects-matter of which, under the dual system of law and equity, courts of equity can properly take cognizance. They certainly were not drawn to change in any respect the line between law and equity as made by the Federal statutes, practice and decisions when the rules were*

promulgated. By the construction which petitioner would put upon Rule 30, it is an attempt to compel one who has a cause of action at law to bring it into a court of equity and then try it without a jury whenever the defendant in that cause can find some head of equity jurisdiction under which he can apply for equitable relief in respect of the subject-matter. The order of procedure, as between the law and equity sides in such cases, always has been that the equity issue is first disposed of by the chancellor, and then, unless that ends the litigation, the original plaintiff may have his action at law and his trial by jury secured him by the 7th Amendment of the Constitution. Liberty Oil Co. v. Condon Nat. Bank, decided November 26, 1922 (260 U. S. 235, ante, 232, 43 Sup. Ct. Rep. 118). Petitioner's construction of Rule No. 30 would deny the successful defendant in the equity action this right. Petitioner seeks to avoid the dilemma by the suggestion that the rule would be satisfied by merely pleading the action at law without proving it; but this would be futile."

Petitioners contend that all counterclaims asserted against the Respondents in the ancillary bill are of a character cognizable in equity and that therefore no right of trial by a jury is involved. They further claim that this fact seems to have been overlooked by the Circuit Court of Appeals. That the said causes of action constitute causes of action at law for which Petitioners have a plain, adequate and complete remedy and in which the Respondents have their constitutional right of a trial by jury and are therefore not cognizable in equity is, we submit, clear from an examination of the said claims, the nature of which we have hereinbefore analyzed (pp. 1 to 4 hereof). That the Cir-

cuit Court of Appeals had a clear understanding of the nature of the counterclaims and that this phase of the case was not overlooked by it but, on the other hand, that the said Court had fully considered all of the alleged causes of action set forth in the ancillary bill appears from the following excerpt from the opinion of Northcott, J., wherein he says:

> "In so far as the matters set up in the ancillary bill constitute *causes of action at law,* there is an additional reason why they may not be asserted in the receivership suit. That suit is a proceeding in equity; and the claims filed by claimant and any counterclaims thereto would necessarily be heard in equity. The claimants, by filing their claims in a court of equity, waive their right of jury trial with respect to the claims filed, but they do not waive such right with respect to independent claims against them which the receivers may seek to assert by way of counterclaim. It is well settled that a counterclaim involving a cause of action at law cannot be asserted in a suit in equity, because of the right of the party against whom it is asserted to a jury trial under the Seventh Amendment to the Constitution. *American Mills Co. v. American Surety Co.,* 260 U. S. 360; *Sinclair Refining Co. v. Midland Oil Co.* (C. C. A., 4th), 55 Fed. (2d) 42, 47." (R. pp. 84 and 85.)

We submit that no extended citation of authorities is necessary in support of the proposition that, under the Seventh Amendment to the Constitution and Section 367 of the Judicial Code (U. S. C. A. Tit. 28, Sec. 384), suits in equity are prohibited in any Court of the United States where a plain, adequate and complete remedy may be had at law. This Court in a long line of cases has so held: *Buzard v. Houston,* 119 U. S. 347 at 351; *Scott v. Neely,* 140 U. S. 106 at 110, 35 L. Ed. 358;

United States v. Bitter Root Development Co., 200 U. S. 451, 472, 50 L. Ed. 550, 560; *Curriden v. Middleton*, 232 U. S. 633 at 636, 58 L. Ed. 765, 767; *Schoenthaw v. Irving Trust Co.*, 287 U. S. 92, at 94 and 95, 77 L. Ed. 185, at 187 and 188.

We further submit it is equally clear from the foregoing authorities that Equity Rule 30 can have no possible application to a case such as the one at bar where advantage is sought to be taken of said rule to defeat the Respondents' constitutional right of trial by jury, as well as their immunity from service of process under the provisions of Section 51 of the Judicial Code (U. S. C. A. Title 28, Section 112) prohibiting the bringing of suit against any person in any other district than that whereof he is an inhabitant.

WHEREFORE, it is respectfully submitted that the writ of certiorari should be denied.

EDWARD W. KNIGHT,
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Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. [redacted] 16

A. S. ALEXANDER, H. D. RUMMEL, and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

BRIEF OF RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. 832

A. S. ALEXANDER, H. D. RUMMEL, and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

BRIEF OF RESPONDENTS.

In this cause the petition is for the issuance of a writ of certiorari directed to the Circuit Court of Appeals of the Fourth Circuit for a review of its decree (R. p. 86) which decree modified, as set forth in the opinion of said Court (R. p. 74), the decree of the District Court for the Southern District of West Virginia at No. 3370 in Equity of said Court (R. p. 26) and remanded the said cause to the said Court for further proceedings in accordance with the opinion of the Circuit Court of Appeals. The decree of the District Court (R. p. 26) so modified, dismissed the Bill of Complaint therein filed for want of jurisdiction over the persons of the Respondents.

The Circuit Court of Appeals in its opinion says:

"We think, therefore, that, instead of dismissing the ancillary bill, the court below should have

retained it, treating it as a petition to stay action on the claims until the counterclaims therein asserted could be adjudicated in a court of competent jurisdiction, and as setting up defenses to the claims in the cases where the matters alleged could be considered as purely matters of defense as distinguished from counterclaims. The order appealed from will accordingly be modified and the cause will be remanded to the end that the court below may give consideration to the question of staying action on the claims pending the adjudication of the counterclaims in a court of competent jurisdiction, and that it may consider any matter set up in the bill which may appropriately be considered as matter of defense against the claims filed. The court should require, however, that new pleadings be filed in lieu of the ancillary bill, setting up as against each claim filed with the receivers any purely defensive matter which the receivers may desire to assert, together with any matter which would justify the court in staying action on the claims pending the adjudication of any counterclaim or counterclaims in a court of competent jurisdiction." (R. p. 83)

As the Circuit Court of Appeals in its opinion holds, the question presented in this cause is the same as that in the cause at No. 3736 of said Court, which was an appeal from an order entered in the Original cause at No. 1434 in Equity of the District Court, wherein Piedmont Coal Company, et al. are plaintiffs and Tower Hill Connellsville Coke Company of West Virginia is defendant, and the decree entered by the Circuit Court of Appeals in this cause is the same as its decree in the cause at No. 3736, to review which a petition for a certiorari has been filed at No. 831 October Term, 1934 of this Court.

As Petitioners have requested that their Petition and Supporting Brief, filed at No. 831, October Term, 1934, be considered and taken as a part of their Petition filed at this Number, Respondents for the convenience of this Court have adopted the same procedure and respectfully request the Court to receive and treat their Brief filed at No. 831 October Term, 1934 as their Brief filed in this cause.

Respondents submit that in said Brief they have refuted Petitioners' statement (Petition p. 2) that the so-called Ancillary Bill set up equitable counterclaims against Respondents.

Although both appeals to the Circuit Court of Appeals presented the same question, viz., the jurisdiction of the District Court over the persons of the Respondents to grant the affirmative relief prayed for in the Ancillary Bill, the two causes are, as the Circuit Court of Appeals has held, in no sense one and the same. The Ancillary Bill seeks to recover large sums of money from Respondents on alleged causes of action *ex delicto* and is in reality an Original Bill against the Respondents who are not parties to the Primary Cause, and the issues in the two causes are entirely different. Hence the said Bill required service of original process. Section 51 of the Judicial Code (U. S. C. A., Title 28, Sec. 112) prohibits the bringing of such a suit in the Southern District of West Virginia against the Respondents, all of whom are citizens, residents and inhabitants of the Commonwealth of Pennsylvania (R. p. 26).

WHEREFORE, it is respectfully submitted that the writ of certiorari in this case should be denied.

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Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

NOS. 15 AND 16

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

NOS. 15 AND 16

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENTS.

I.

QUESTIONS INVOLVED.

(1) Where a Federal District Court has appointed Receivers to wind up the affairs of a solvent corporation and appointed a Master under an Order of Reference to receive Proofs of Claims of creditors and stockholders of such Corporation, and non-resident claimants, not parties to the proceedings, pursuant to said Order of Reference and notice given by the Master, appear before the Master and present their Proofs of

Claim, does such action make them parties to the Primary Cause and subject them to the jurisdiction of the Court on a Bill of Complaint thereafter brought by the Receivers against them in said Court setting up certain claims against them not merely as defenses to the claims filed, but on which affirmative relief is sought by way of personal decrees for money damages?

(2) Is the presentation of a Proof of Claim upon a reference in a Federal Equity Receivership under penalty of forfeiture of claimant's right to participate in the distribution of the Estate in Receivership equivalent to filing a Bill in Equity against the Corporation in Receivership?

(3) May separate unrelated claims filed with a Special Master under an Order of Reference in a receivership proceeding be treated as a single Bill in Equity conforming to the Equity Rules, and may a Bill of Complaint, joining as defendants the several claimants, purporting to be filed as ancillary to the original cause in which the Order of Reference was entered, and which sets up new, independent and separate causes of action against said claimants, be treated as an Answer and Counter-claim to each of said Proofs of Claim under Equity Rule 30?

II.

COUNTER-STATEMENT OF CASE.

As Petitioners have filed but one brief at Nos. 15 and 16 October Term, 1935 of this Court, in which the reference to the records are to the printed record at No. 15, the Respondents, for the convenience of the Court, have adopted the same procedure. Respondents also accept Petitioners' Statement of the Case, as set forth in Petitioners' Brief, as being in the main correct, except for the corrections and amplifications thereof hereinafter set forth.

Petitioners, in adopting this procedure, however, call attention to the fact that while each appeal in the Circuit Court of Appeals of the Fourth Circuit from the decree of the District Court for the Southern District of West Virginia involved the same question and the parties thereto were the same, the said appeals were taken from decrees of the District Court entered in two causes in which the parties and issues involved were entirely different. None of the Respondents was a party to the "Primary Cause" or had intervened therein.

On March 30, 1930, proceedings ancillary to the said cause had already been commenced and Petitioners had been appointed Ancillary Receivers of Tower Hill in the United States District Court for the Western District of Pennsylvania, which proceedings are now pending, 64 Fed. 2nd. 818, (R. 3). In said district all of the property and assets of Tower Hill are situate and all of the Respondents are inhabitants thereof (R. 67).

The so-called "Ancillary Bill of Complaint", (R. 39) for a statement of the grounds upon which the Court's jurisdiction depends, alleges the appointment of Petitioners as Receivers for Tower Hill in the Primary Cause, the order of Reference to the Special Master, the

hearing held thereon, the appearance by Respondents thereat and the presentation of their Proofs of Claims in said proceeding. The Bill thereupon sets forth certain alleged causes of action against the Respondents severally and prays for affirmative relief in the form of decrees for the payment of money against one or more of them upon each of said causes.

The Bill alleges that Respondents Hillman, Sheets and Watson continuously during the respective periods in said Bill set forth were officers and directors of Tower Hill, Tower Hill of Pennsylvania and Eastern and were also officers and directors of the Hillman Company, Hecla, Thompson-Connellsville Coke Company, and Fayette Investment Company (R. 46), and that the majority of the directors and officers of each of said corporations were the same persons, were nominees and for all practical purposes the employees of Hillman, that Hillman was the dominating influence of all of said corporations and that Sheets and Watson as officers and directors thereof acquiesced in and approved of such domination and lent their assistance in carrying it into effect. (R. 42, 46).

The Bill further alleges that "the majority of the directors of Hecla and Tower Hill of Pennsylvania were the same persons, and Hecla, through its control of Fayette Investment Company and thereby of Thompson-Connellsville Coke Company, was the owner of the majority of the capital stock of Tower Hill, which in turn owned all the stock of Tower Hill of Pennsylvania". (R. 52).

The gist of the alleged wrongful acts of the several Respondents complained of and the relief sought against them and each of them are:

One. The taking of certain sums monthly by Respondents, Hillman, Sheets and Watson, during the

period from May 1920 to October, 1933 under the guise of salaries as officers of Tower Hill, Tower Hill of Pennsylvania and Eastern (R. 42, 43). The relief sought is a decree for an accounting and payment of these moneys by said Respondents and each of them (R. 54).

Two. The purchase of 11,840 shares of capital stock of Emerald Coal and Coke Company, for which the sum of $1,184,000.00 was paid by Tower Hill, on the ground that the expenditure of said funds was a misappropriation of the moneys of Tower Hill, made for the benefit of Hillman and constitutes mismanagement of the corporate affairs of Tower Hill of a fraudulent character (R. 43-46). The relief sought is a decree against Respondents, Hillman, Sheets and Watson, and each of them, for the payment of $1,184,000.00, with interest, on the surrender by the Petitioners of the said shares of stock (R. 54).

Three. Improvident and fraudulent waste and misappropriation of the funds of Tower Hill, Tower Hill of Pennsylvania and Eastern by means of a pool arrangement by which the Respondent, Hillman Company, apportioned and allocated certain office, overhead and engineering expense among various corporations, with which it was connected or affiliated, including the said three named companies, and the operation of Tower Hill and its said subsidiaries and sale of their products as mere departments of Hillman Company, in consequence of which Tower Hill and its said subsidiaries lost large sums of money (R. 46-51). The relief sought is that Respondents, Hillman, Sheets, Watson and Hillman Company account for all moneys received and retained by Hillman Company from Tower Hill and its said subsidiaries by reason of the said pool arrangement, and that said Respondents and each of them be decreed to pay to Petitioners, all such moneys as upon

said accounting may be adjudicated to be due and owing to Tower Hill or Petitioners (R. 55).

Four. The exchange by Tower Hill of Pennsylvania of 178.4 acres of coal with Redstone Coal and Coke Company for property known as Thompson-Connellsville No. 1 Plant of Redstone, alleged to have had little if any value, which exchange is alleged to have been caused by Hillman through his control of Tower Hill of Pennsylvania, for the purpose of benefiting Hillman and Hecla; and grossly improvident expenditures in taxes, maintenance and improvements of Thompson-Connellsville No. 1 Plant brought about by the fraud of Hillman, Sheets and Watson in imposing said property on Tower Hill of Pennsylvania (R. 51-54).

The relief sought is that Respondents, Hillman, Sheets, Watson and Hecla, and each of them, be decreed (a) to pay to Petitioners, the sum of $350,800.00, with interest, the alleged value in cash of the 178.4 acres traded by Tower Hill of Pennsylvania with Redstone in exchange for the said Thompson-Connellsville No. 1 property, upon conveyance by Petitioners of said property to such person or persons as the Court may direct; and (b) to account for and repay to Petitioners all moneys of Tower Hill and/or Tower Hill of Pennsylvania expended for taxes upon the operation and maintenance of said property, less such moneys as have been heretofore received by Tower Hill and/or Tower Hill of Pennsylvania for coal produced and coke manufactured and sold from said Thompson-Connellsville No. 1 property (R. 55).

The Circuit Court of Appeals, in the opinion of Northcott, J. (R. 67) says:

> "Most of the causes of action asserted in the ancillary bill appear not to have grown out of the transactions which were the basis of the claims

filed with the receivers, but to constitute independent claims in behalf of the receivers against claimants."

While each Proof of Claim presented to the Special Master by the several Respondents is a claim *ex contractu*, each cause of the action set up in the so-called Anciliary Bill is an action *ex delicto*. The sole relief asked against each Respondent is a decree *in personam* for the payment of money. While the several prayers are for accountings, the accountings sought are only for the purpose of ascertaining the damages alleged to have been sustained by reason of the alleged unlawful acts of the Respondents. The Bill contains no prayers for discovery, or for the recovery of any specific property, or for any other relief peculiar to equity.

Petitioners' statement, "Each of the matters complained of in the Ancillary Bill is cognizable in a court in equity," (Petitioners' Brief 5), is a question of law which they raise in their Argument (Petitioners' Brief 47).

The Order of Court entered February 19, 1934, in the Primary Cause, in addition to the matters stated by Petitioners (Petitioners' Brief 5), provided that all questions as to the jurisdiction of the Court and other questions were reserved by the Court for future decision as such questions might arise, and that nothing in said Order was decided, except that the said Bill should be filed and notice thereof be had as directed in said Order (R. 19). Respondents, in the Motions filed by them to vacate said Order in the Primary Cause and to dismiss the Bill of Complaint in the Ancillary Cause (Petitioners' Brief 5), each appeared specially for the purpose of making the said Motions and without submitting himself or itself to the jurisdiction of the Court, but

solely for the purpose of questioning said jurisdiction. The reasons assigned in each of said Motions were the same, viz., that each of the individual Respondents was at the time of the entry of the said Order and of the filing of the said Bill and always since has been a citizen, resident and inhabitant of the Commonwealth of Pennsylvania and a resident of the City of Pittsburgh, Allegheny County, in said Commonwealth, and each of the corporate Respondents is a corporation created and existing under the Laws of the Commonwealth of Pennsylvania, with its domicile in the City of Pittsburgh, in said Commonwealth and a citizen, resident and inhabitant of the said Commonwealth within the purview of Section 51 of the Judicial Code of the United States (U. S. Tit. 28, Sec. 112), with respect to venue (R. 21, 58).

The District Court in a Memorandum Decision held that it had no jurisdiction over Respondents to grant the affirmative relief prayed for in said Bill, and entered its Decree sustaining Respondents' Motions, and vacated its Order in the Primary Cause directing the Bill to be filed, and also entered a Decree in the Ancillary Cause dismissing the said Ancillary Bill. Upon appeal the Circuit Court of Appeals (75 Fed. (2) 451), held that the District Court was correct in holding that it had not acquired jurisdiction to grant any affirmative relief against Respondents, but did have jurisdiction to pass upon any defense, legal or equitable, which might be asserted against the claims filed with the Petitioners, and to stay action upon those claims until the claims asserted in the Ancillary Bill could be adjudicated in a court of competent jurisdiction, so that they could be set off against the claims, or the amounts payable thereunder, saying (R. 73):

"We think, therefore, that, instead of dismiss-

ing the ancillary bill, the court below should have retained it, treating it as a petition to stay action on the claims until counter-claims therein asserted could be adjudicated in a court of competent jurisdiction, and as setting up defenses to the claims in the cases where the matters alleged could be considered as purely matters of defense as distinguished from counter-claims. The order appealed from will accordingly be modified and the cause will be remanded to the end that the court below may give consideration to the question of staying action on the claims pending the adjudication of the counter-claims in a court of competent jurisdiction, and that it may consider any matter set up in the bill which may appropriately be considered as matter of defense against the claims filed. The court should require, however, that new pleadings be filed in lieu of the ancillary bill, setting up as against each claim filed with the receivers any purely defensive matter which the receivers may desire to assert, together with any matter which would justify the court in staying action on the claims pending the adjudication of any counter-claim or counter-claims in a court of competent jurisdiction. Modified."

III.

SUMMARY OF ARGUMENT.

(1) Issue One of Venue.

The fundamental issue in this case is not one of the general powers and jurisdiction of a federal court in a receivership in equity. The issue is one of venue in a civil suit brought by the receivers of such a court. The aim is to secure personal decrees, for the payment of money, against non-resident defendants, who appear here specially to raise the question of jurisdiction, asserting their right under Section 51 of the Judicial Code (U. S. C. A. Tit. 28, Sec. 112) to be sued in the district whereof they are inhabitants.

(2) So-Called Ancillary Bill Is an Original Bill Against Respondents.

Petitioners call the suit an ancillary one, but the issues and parties are not the same as the issues and parties in the primary cause.. Respondents, named as defendants in the so-called ancillary bill, were not parties to the primary cause, and the claims asserted against them here constitute new and independent claims against them. A contested claim is not a part of the receivership *res* but the subject of a plenary action, which the court has no inherent power to adjudicate without first obtaining jurisdiction over the person. Hence the bill of complaint here is an original bill as against the respondents, requiring original process.

(3) Proving of Claims in a Federal Equity Receivership Does Not Make the Claimant a Party to the Original Cause.

Under the federal practice a person does not, by filing a claim with the receiver, make himself a party to the original cause, much less to another so-called ancillary cause growing out of the original cause. The proceeding in which claimant appears and presents his claim is one in aid of the main suit. It is one in which the claim is presented on the invitation and for the information of the court and for said purpose claimant makes himself a party *pro hac vice* only.

(4) Respondents Have Not Waived the Privilege Under Section 51 of the Judicial Code by Presenting Claims in the Receivership Proceeding.

(a) NATURE OF PRIVILEGE.

The privilege of a non-resident defendant under Section 51 of the Judicial Code may be waived, but only by some act which *unequivocally* evidences his intent to submit himself to the jurisdiction of the court wherein suit has been brought, and his consent to its adjudication of the merits of the *particular* controversy wherein he is made a defendant. Respondents' presentation of their proofs of claim before the Special Master does not constitute such consent.

(b) RESPONDENTS HAVE NOT WAIVED THEIR PRIVILEGE.

There is a radical difference between presenting a proof of claim in a federal equity receivership and filing a bill in equity. The claimant is not in a court of his own choosing. He is not in any proper sense an actor or movant in the cause. His position is analogous to that of a defendant rather than a plaintiff. His claim

is presented on the invitation of the court, under penalty of its forfeiture if he fails to comply with the court's order, and for the information and guidance of the court, in making distribution of the estate of which it has taken custody. The claim is presented pursuant to a privilege exercised by the court, not the claimant. The court, as a result of the compliance with its order, casts around a claimant its protection from being subjected to litigation in said court in a suit seeking affirmative relief against him in the form of a money judgment or decree.

(c) DISCUSSION OF PETITIONERS' AUTHORITIES.

(5) Equity Rule 30 Has No Bearing on Question Involved.

The application of Equity Rule 30 contended for by petitioners would defeat the provisions of Section 51 of the Judicial Code. Furthermore, the rule was not intended to apply to proceedings of the kind before the Court and its application here would tend to confusion rather than simplification and serve no useful purpose.

(6) Comments on Contention That All Claims Asserted in So-Called Ancillary Bill Are Cognizable in Equity.

While the decision of the question whether any or all of the causes of action set up in the bill constitute causes of action at law is not necessary to a decision of the fundamental question of venue, there is an additional reason why they may not be asserted in a receivership suit, viz., that a counter-claim involving a cause of action at law cannot be asserted in a suit in equity. This because of the right of the party, against whom the claim is asserted, to a jury trial under the Seventh Amendment to the Constitution.

IV.

ARGUMENT.

(1) The Issue Involved in These Appeals in the Last Analysis Resolves Itself Into One of Venue.

The federal district wherein a civil suit shall be brought is fixed by Section 51 of the Judicial Code (U. S. C. A., Title 28, Sec. 112), which section, so far as it is applicable to this case, provides:

> "(a) Except as provided * * * in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; * * *."

The exceptions to the prohibition upon bringing any person before a district court by any original process or proceeding in any other district than that whereof he is an inhabitant, contained in Section 51 of the Judicial Code, do not apply to the proceedings before the Court.

None of the Respondents, parties to the so-called Ancillary Bill, which the District Court in its Order entered February 19, 1934, directed to be filed, was named as a party in the Bill of Complaint filed by Piedmont Coal Company, et al. against Tower Hill Connellsville Coke Company of West Virginia, or intervened therein. None of the Respondents is an inhabitant of the Southern District of West Virginia, but each of said parties is an inhabitant of the Western District of Pennsylvania.

Petitioners' first proposition as set forth in their Argument (Petitioners' Brief 11), is that "A district

court administering a receivership estate has authority to adjudicate all claims respecting the *res*, not only those to or against the *res* but those on behalf of the *res* against others," in support of which they cite the well known cases of *White v. Ewing*, 159 U. S. 36; *40 L. Ed.* 67; *Peck v. Elliott*, 79 Fed. 10 (C. C. A., 6th) and *Pope v. L. N. A. & C. Ry. Co.*, 173 U. S. 573, 43 L. Ed. 814.

They admit, however, that the jurisdiction of the court in administering an estate in receivership and adjudicating claims of or against the corporation in receivership is limited in that it must acquire jurisdiction of the persons against whom the power is sought to be exercised (Petitioners' Brief, 12).

Respondents do not question the jurisdiction of a federal district court to maintain an action by its receiver to recover moneys claimed to be due an estate in receivership from defendants who are residents of the district. Their sole objection is that the instant suit against them, they being non-residents of the district, must be brought in the district whereof they are inhabitants.

The fundamental question in the cases at bar, therefore, is not one of the general powers and jurisdiction of a court of equity in a receivership proceeding, but as was expressly stated in *Barfield v. Zenith Tire & Rubber Co.*, 9 Fed. (2nd) 204, the question is "simply one of venue of an action at law, the subject matter of which is within the court's jurisdiction * * *. It *(White v. Ewing, supra)*, does not reach the point in the motions raised before us." Whether the action be one at law or in equity, the principle is the same.

In *White v. Ewing, supra*, the non-resident defendants, decrees against whom were sustained, had volun-

tarily appeared and answered the ancillary bill. This fact appears in the Statement of the Case by Mr. Justice Brown (p. 37), also in the *per curiam* opinion of the Circuit Court of Appeals of the 6th Circuit, 66 Fed. 6; and is further commented upon in the footnote to *Kelly v. Gill,* 245 U. S. 116, 62 L. Ed. 185, at p. 188. We have been unable to find a case in which the jurisdiction of an ancillary bill of the nature of that in the cases at bar has been sustained against non-residents who had not similarly appeared and answered.

Peck v. Elliott, 79 Fed. 10 (C. C. A. 6th), is a case similar to *White v. Ewing, supra,* and differs from the cases at bar in that the defendant did not avail himself of the privilege of questioning the court's jurisdiction on the ground of venue. On the other hand, he filed a general answer, in which while objecting to the jurisdiction of the court on grounds other than venue, he at the same time pleaded to the merits.

Pope v. L. N. & A. C. Rwy. Co., 173 U. S. 573, 43 L. Ed. 814, has no analogy to the one at bar. The case was heard on the merits before the question of jurisdiction was raised (Opinion p. 575) and the question of the jurisdiction which was raised was not under Section 51 of the Judicial Code but as to the jurisdiction of the Receiver himself to bring the Bill under his order of appointment. The Bill brought by the Receiver was dismissed by the Circuit Court of Appeals and the Supreme Court in its opinion dismissed the Receiver's appeal.

As is said in *Schmitt v. Lamb,* 43 Fed. (2nd) 770, at 772:

> "In considering the exact question for determination, on the motion to quash the process, in the case at bar, it is necessary to distinguish between the court's having jurisdiction of the sub-

> ject-matter and bringing in new parties. In the latter case service of process in ancillary proceedings is governed by the same rules as obtain in the case of an original suit."

In *Barfield v. Zenith Tire & Rubber Co.* (*supra*), the District Court for the Northern District of Ohio, Western Division, sustained a motion to quash service of an ancillary bill filed by its Receiver against certain directors and stockholders of the corporation in receivership to recover from them the value of certain shares of stock alleged to have been fraudulently issued by the defendant directors to one of their own number, no one of said defendants to the said ancillary bill being a resident of the division or within the jurisdiction of the court when service was had of said bill. The Court in its opinion (p. 204) said:

> "In short the action is for a judgment against the defendants which is under no contingency whatever; one *in personam* attempting a recovery which, if had, would be definite and subject to no change because of subsequent developments in the main case. The question then is simply one of venue of an action at law, the subject-matter of which is within the court's jurisdiction, that is, whether the court having jurisdiction of the subject-matter, because of the ancillary character of the suit, may, by process served beyond the court's territorial jurisdiction, compel an individual to meet here an obligation which he may independently owe to the estate under administration; for we should treat these defendants, although alleged to be jointly and severally liable, as one individual."

Petitioners' entire argument is an attempt to avoid this issue, contending that Respondents, by filing their

proofs of claim in the Primary Cause, prior to the date of the filing of the so-called Ancillary Bill, had already submitted themselves to the jurisdiction of the Court, and had thereby waived their personal privilege under the statute.. Respondents submit that the District Court and the Circuit Court of Appeals committed no error in holding that the said Bill is an original Bill as to them, and hence requires the service of original process, and that Respondents, by filing their said proofs of claim, have not waived their personal privilege to be sued in the district whereof they are inhabitants.

(2) Petitioners' So-called Ancillary Bill of Complaint Is an Original Bill Against Respondents, Hence Requires Original Process.

As the District Court in its Memorandum Decision (R. 23), states and as the record shows, the said Bill of Complaint (R. 39), seeks to recover large sums of money from each of the Respondents. The Bill shows that each cause of action stated therein is *ex delicto,* being based on allegations of fraud, mismanagement or other acts equivalent thereto. The sole relief sought against each Respondent is a decree *in personam* for the payment of moneys.

The Circuit Court of Appeals in describing the said Bill in its opinion by Northcott, J., says, (R. 67):

> "The ancillary bill tendered for filing at that time alleged that claimants Hillman, Sheets and Watson as directors of Tower Hill had mismanaged the affairs of that corporation and had misapplied its assets in the payment of improper salaries and in the transfer of assets for the benefit of other corporations in which they were interested; that, as a result of their mismanagement, Hecla had re-

> ceived valuable property through an exchange with the Redstone Coal & Coke Co., to which Tower Hill was a party, and in the course of which Tower Hill had parted with property of great value and received property of insignificant value in return; and that the claim of the Hillman Company was based upon an arrangement between that company and Tower Hill growing out of the mismanagement of the latter by Hillman, Sheets, and Watson and that the Hillman Company was liable to the receivers for moneys which it had received pursuant to this arrangement. Most of the causes of action asserted in the ancillary bill appear not to have grown out of the transactions which were the basis of the claims filed with the receivers, but to constitute independent claims in behalf of the receivers against the claimants."

and holds that the said Bill is an original and not an ancillary proceeding, saying (R. 69):

> "And where an ancillary bill, as does the bill here, brings in new parties to the original suit and charges new matter as a basis of relief, the proceeding as against such new parties in an original, not an ancillary, proceeding, and they must be properly served with process to give the court jurisdiction. *Duan v. Clark,* 8 Pet. 1; *Smith v. Norfolk,* 115 U. S. 143, 148; *G. & C. Merriman Co. v. Saalfield,* 241 U. S. 22; *Manning v. Berdan,* 132 Fed. 382; *Bowers v. Christian,* 16 Fed. 729; *Hart v. Wiltsee, supra.*"

As the authorities in support of the ruling of the Circuit Court of Appeals on this proposition are so abundant, and as no attempt is made by counsel for Petitioners to refute them, it is unnecessary to do

more than call the Court's attention to the following leading cases, which emphasize that a clear and definite distinction is drawn between a purely ancillary bill and a bill which, though filed as a dependent or ancillary bill, is in reality an original bill requiring service of original process.

G. and C. Merriam Co. v. Saalfield, 241 U. S. 22, 60 L. Ed. 868, a relatively recent case, distinguishes an original from a supplemental or ancillary bill. The sole question involved was the jurisdiction of the District Court to make and enforce a decree *in personam* against the appellee, one Ogilvie, a non-resident by means of substituted service of an ancillary bill. Appellant contended that Ogilvie, though not a party to the original bill, by actively conducting, controlling and directing its defense had made himself privy to the suit and an actual though not a nominal party thereto, and was bound by the proceedings and decree therein.

Ogilvie's motion to quash the service of the bill and set aside the proceedings as against him was sustained. Mr. Justice Pitney in denying appellant's contention makes the following pertinent statements:

> "* * * *So far as the supplemental bill seeks to bring in Ogilvie as a new party and obtain relief against him, it is not, in any proper sense, dependent upon or ancillary to the original suit against Saalfield.*‡ * * * The object of the original bill was to obtain an injunction and recover profits from Saalfield; that of the supplemental bill is to obtain an injunction and an accounting of profits against Ogilvie respecting the same transactions. But the merits are not to be adjudicated against him until he is brought into court, and as against him the

‡ Italics ours throughout this Brief unless otherwise noted.

supplemental bill is an original, not an ancillary, proceeding. *But the merits are not to be adjudicated against him until he is brought in to Court, and as against him the supplemental bill is an original not an ancillary proceeding.* In *Duan v. Clarke,* 8 Pet. 1, 8 L. Ed. 845 * * * this court said * * * 'The injunction bill is not considered an original bill between the same parties, as at law: but, if other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill; and the jurisdiction of the circuit court must depend upon the citizenship of the parties. In the present case, several persons are made defendants who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised by this or the circuit Court.' So far as it shows the distinction between an original bill and one that is not to be so considered, the case is in point upon the present question."

In *Smith v. Woolfolk,* 115 U. S. 143, page 148, 29 L. Ed. 357, 359, the Court says:

"So that, even if the decree made on the original bill was not final, the petition filed by Todd was so radical a departure from the case made and relief prayed by the original bill as to be a new suit and require service of process on the parties made defendant thereto. It instituted a new litigation on new and distinct issues not raised by the original pleadings, and between parties who were complainants in the original case.

* * * * * * *

"After a decree disposing of the isues and in accordance with the prayer of a bill has been made, it is not competent for one of the parties, without a service of new process or appearance, to institute

further proceedings on new issues and for new objects, although connected with the subject matter of the original litigation, by merely giving the new proceedings the title of the original cause."

In *Bowen v. Christian, et al.* (C. C. E. D. Mich.) 16 Fed. 729, a receiver appointed in a suit to wind up a partnership filed a bill in equity to set aside certain mortgages upon the partnership property as fraudulent and obtained an order for substituted service upon the attorney in fact for the mortgagees. The non-resident mortgagees appeared specially and moved the vacation of the said order and their motion was granted. Pertinent statements from the opinion of Mr. Justice Brown are the following:

"I am not aware that new parties, who are not connected in any way with the plaintiff in the original suit, can be brought into court in this way; * * * but if other parties are made by the bill, and different interests are involved, it is, as to them, an original suit and the jurisdiction of the court must depend upon their liability to be sued by the plaintiff, as in other cases.

"In this case defendants are not parties to the original suit. They are simply lien holders of the property in the possession of this court. This bill is clearly an original bill, since it relates to a matter not before litigated in this court by the same persons. As Mr. Justice Story says: *'Bills not original are those which relate to some matter already litigated in the court by the same persons, and which are either in addition to, or in continuation of, an original bill, or both.'*

"This bill is undoubtedly a continuation and carrying forward, to some extent, of the original suit, since, in order to fix the amount of McNichol's

interest in the partnership assets, it is necessary to determine the validity of these mortgages. But none of the parties to this suit are parties to the other. The bill is not less an original one because it happens to be an outgrowth of the other. It is not unlike cases where assignees in bankruptcy are compelled to file bills of a similar nature to set aside conveyances made by the bankrupt. In such cases the authorities are nearly uniform that the assignee must proceed, not by petition in the court of bankruptcy, but by bill in equity in the circuit or district courts against the fraudulent vendees or mortgagees. *Smith v. Mason,* 14 Wall. 419; *In re Marter,* 12 N. B. R. 185; *Bradley v. Healey,* 1 Holmes, 451."

Other authorities in point are: *Shainwald v. Davis et al.* (D. C. Cal.), 69 Fed. 701; *Gregory v. Pike* (C. C. A. First), 79 Fed. 520; *Manning v. Berdan et al.* (D. C., N. J.), 132 F. 382; *Rubber Co. v. Goodyear,* 76 U. S. 807, 19 L. Ed. 587. *Simkins Federal Practice* (Rev. Ed.), 756.

No argument is needed to show that the causes of action alleged in the Bill at No. 1434 in equity (Primary Cause), and those alleged at No. 3370 in equity (Ancillary Cause) are essentially different. The fundamental issue in the case at No. 1434 was whether the rights of the preferred stockholders were so imperilled by the management of the defendant as to warrant the appointment of a receiver to wind up its affairs. The issues now raised by the Bill at No. 3370 are whether the Respondents, Hillman, Sheets and Watson and the two Respondent corporations, are liable to Petitioners in damages by reason of their dealings with Tower Hill. The causes of action alleged in said Bill are not only the acts of fraud and mismanagement averred in the

former bill, but are based on other actions not theretofore complained of. The suits were brought by different parties complainant against different parties defendant, and no party in either suit was made a party to the other.

Causes of Action Asserted in Bill Are the Subject of Plenary Actions and Are Not Part of the Res.

A contested claim is not a part of the *res* which the court in a receivership proceeding is administering, but is the subject of a plenary action whether at law or in equity, and the Court has no inherent power to adjudicate the claim unless it has first secured jurisdiction over the person of the defendant.

In *Hart v. Wiltsee,* 19 Fed. (2nd) 903, (C. C. A. First), it is held that a proceeding to recover damages occasioned to a receivership estate through the alleged fraud of a committee of note holders of the corporation in the hands of a receiver should be a plenary one at law or in equity, as it was not one to recover property belonging to the receivership estate in the possession of the Committee but was for a *tort* to recover damages occasioned to the estate by the alleged fraud.

In *Wood v. N. Y. & N. E. R. Co.,* 61 Fed. 236 (C. C. D. Mass.), the Court which appointed receivers for the defendant Railroad Company held that it had no jurisdiction to grant relief on a petition in the nature of an injunction bill, filed in the original cause by the receivers against another Railroad Company, alleging unjust discrimination against the estate in receivership. The Court in that case says:

"They (the petitions of the receivers) do not relate to the administration of the insolvent estate, but to a disputed claim made on behalf of the estate. I do not think these proceedings come within the jurisdiction invoked by the present bill, * * *."

In *Railroad Credit Corporation v. Fruit Growers' Express Co.*, 71 Fed. (2nd) 218, the Court of Appeals of the District of Columbia held that a right of action arising out of a contract is not property which the court on appointing a receiver for a defendant corporation has taken into its possession. In that case the Court says (p. 219):

"* * * There is no doubt that the rule is that, when a court of competent jurisdiction has taken property into its possession, the property so taken is withdrawn from the jurisdiction of all other courts. But the applicability of the rule is not apparent here, for the subject-matter of this suit is not property in the sense in which the rule applies. It is no more than a debt due by the Express Company either to the pledgor or the pledgee of the shares of stock on which the dividend was declared, and its *situs* is outside the territorial limits of the receivership court. *In that aspect it is no more than a contested claim,* and we do not think the mere appointment of receivers makes it part of the *res* which the court is administering. In this view we think the demurrer should not have been sustained."

(3) The Proving of Claims Before a Special Master to Whom an Order of Reference Has Issued in a Federal Equity Receivership Proceeding Does Not Make the Claimant a Party to the Original Cause.

Petitioners' Brief (p. 18) states:

> "A court obtains jurisdiction of persons in either of two ways—by service of process or by submission. The former is not here claimed, * * *"

Petitioners' position is succinctly stated by Northcott, J. (R. 69), as follows:

> "The position of appellants is that these persons made themselves parties to the original cause by filing claims before the special master, and that no further service of process upon them, or consent to jurisdiction on their part, was necessary to give the court jurisdiction to award relief against them on the ancillary bill."

and effectively answered by the Court as follows:

> "The answer to this, however, is that under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause. *Elkins v. First Nat. Bank of the City of New York* (C. C. A., 4th) 43 Fed. (2d) 777; *Acme White Lead & Color Works v. Republic Motor Truck Co.*, 285 Fed. 88; *Jones & Laughlins v. Sands* (C. C. A., 2d) 79 Fed. 913; *Youtsey v. Hoffman*, 106 Fed. 693; *Sands v. Greeley Co.*, 80 Fed. 193; *Clark on Receivers*, vol. 1, page 717."

Northcott, J., in support of the Court's ruling that under the federal practice a party by filing a claim in a receivership proceeding does not make himself a party to the original cause, refers to *Whelan v. Enterprise*

Trans. Co., 164 Fed. 95 and *Youtsey v. Hoffman*, 108 Fed. 693. The facts and discussion therein he considers to be much in point and we respectfully refer this Court to Judge Northcott's discussion of these two cases (R. 69-71). In addition to the authorities cited by him, this Court's attention is called to two cases decided by the Circuit Court of Appeals for the Ninth Circuit which further sustain the rule as stated by the Fourth Circuit.

In *International Banking Corporation v. Lynch*, 269 Fed. 242, 246, the Appellate Court held that a creditor by filing its proof of claim with the receivers, pursuant to the district court's order, did not become a party to the cause and subject to a restraining order *previously* entered. The Court in its opinion (p. 246) says:

> "The filing with the receiver of the sworn statement of the appellant Banking Corporation's account against the insolvent debtor could not operate to make the appellant bound or in any way affected by the restraining order made by the court months before; it was in no sense a pleading in the case, its only function being to inform the receiver of the amount it would be necessary for him to pay in order to redeem the pledged securities and to acquaint him with what the appellant might be entitled to receive, if anything, out of the general assets of the insolvent estate should the securities held by the appellant fail to realize the total amount due it."

In *Lucey Manufacturing Corporation v. Morlan*, 14 Fed. 2d 920, an action at law had been brought in the state court of California (then removed to the District court for the Southern District of said state) by one Morlan, an assignee for certain creditors of Lucey Manufacturing Corporation, a New York corporation for whom

Receivers had been appointed in the United States District Court for the Southern District of New York prior to the date of the entry of the suit. Morlan, upon filing the complaint in the State Court, attached defendant's tangible property in California. Lucey Company filed an answer to the complaint, in which one of the defenses set up was that some of its creditors for whom Morlan was assignee and whose claims were being prosecuted, had filed proofs of claim in the New York federal proceeding, pursuant to an order directing the filing of the claims and had thereby elected to become parties to that proceeding and could not seek preference by attachment in California. The case was tried without a jury and judgment entered for the plaintiff, which on appeal was affirmed, Hunt, C. J. in his opinion saying:

> "We are unable to uphold the contention that the effect of filing claims with the Receivers made the creditors who filed parties to the New York proceedings, and bound them by the decrees that had been made in such proceedings."

That the proceeding before the Special Master is merely a proceeding in aid of and therefore ancillary to the main cause, to wit, the proceeding at No. 1434 in Equity, wherein Receivers were appointed for Tower Hill, the sole defendant therein named, is too clear to admit of any extended argument. Judge Northcott in his former opinion in this case, 64 Fed. (2nd) 817, held that parties who should appear before the special master to receive a portion of the assets of the defendant corporation belonging to them would thereby become parties to the suit *pro hac vice* only. In holding that Tower Hill itself was the only indispensable party before the court, for the purposes of having Receivers appointed for it, Judge Northcott says:

"As under the decree defendant's assets come into the possession of the receivers, and the *distribution* is to be made according to the rights of the creditors and stockholders, the proceeding will be one in aid of the main suit, and all parties will have notice and will be afforded full opportunity to be heard on all questions arising as to such distribution."

And again he says:

"After dissolution is decreed, they can come in and receive the portion of the assets belonging to them and make themselves parties to the suit *pro hac vice,* but this does not defeat the jurisdiction, for this is what happens in every receivership case."

In *Elkins v. First National Bank of the City of New York,* 43 Fed. (2nd) 777, the Circuit Court of Appeals for the Fourth Circuit in an opinion by Judge Parker, says on page 779:

"It is not the ordinary or proper procedure in a receivership proceeding to allow claimants who can have their controversies settled before a master with right of review by the court *to be made parties to the original cause* and thus complicate the issues there involved. *Acme White Lead & Color Works v. Republic Motor Truck Co.* (D. C.) 285 F. 88; *Jones & Laughlin v. Sands* (C. C. A. 2nd) 79 F. 913; *Sands v. Greeley Co.* (C. C.) 80 F. 195."

All of the cases cited sustain the proposition enunciated therein, to wit, that claimants against an estate in receivership will not be allowed by intervention to become parties to the primary cause where their rights may be conserved by proving their claims before a special master appointed in said cause for the purpose of

hearing and determining the validity of such claims, in which event, as Judge Northcott has so well said in the former opinion in this case: "they become parties to said cause *pro hac vice.*"

Intervention in federal equity proceedings and the effect thereof is specifically covered by Equity Rule 37; and that one does not become a party to a suit by appearing before a master for the purpose of proving a claim, and that there is a clear distinction in effect between the presentation of claims before a master in a receivership proceeding and an intervention in such proceeding is also brought out in *Clark on Receivers,* Vol. 1, Chapter 18, entitled "Intervention". On page 717, Sec. 532 (c), Clark says:

> "(c) DISTINCTION BETWEEN INTERVENTION AND PRESENTATION OF CLAIMS. When a special receiver is appointed of part of the property of a defendant, individual or corporation, any one claiming an interest in such property should generally intervene in the case, become a party, file a motion or petition *pro interesse suo,* or file a dependent or ancillary bill.
>
> "However, when a general receiver is appointed of the property of an individual or a corporation with the ultimate purpose of distributing such property among creditors and others entitled to receive the property, the court will generally make an order *inviting* claimants to present their claims duly approved to the receiver.
>
> "The presentation of the claims does not make the party presenting the claim, strictly speaking, a party to the suit in which the receiver is appointed, but the effect of presenting such claim properly verified and proved is to give the receiver notice of such claim. Having notice of such claim the re-

ceiver under orders of court cannot properly make distribution without taking such claim into consideration. * * *

"Although a court invites claimants to present their claims to the receiver to be heard by the receiver or a special master, this does not of itself prevent a claimant from intervening. However, the court may in its discretion, refuse permission to intervene when it is perfectly apparent that a claimant's rights may all be equitably and fairly adjudicated and adjusted through presentation of his claim to the receiver. (See matter discussed at length this chapter under section 532.)"

Again Clark, in dealing with the subject of *Procedure on Intervention,* in Section 533 (c), page 724, says:

"(c) INTERVENOR A NEW PARTY. An intervenor in a receivership who is admitted to the suit to become a party plaintiff, or defendant and who sets forth a claim supplementing the main plaintiff's claim, or setting forth a defense which supplements the main defense, should have the standing in court of a party to the suit in the full sense of the word.

"On the other hand, one who files a claim against the receivership under an order of court authorizing claims to be filed, only becomes a quasi-party and one who intervenes and files a claim without setting forth, any cause of action further than filing such claims has not the standing in court of one who sets forth a full cause of action."

Continental Trust Co. v. Toledo, St. L. and K. C. R. Co., 82 Fed. 642, decided by the late Mr. Chief Justice Taft, when Circuit Judge, whose opinion is quoted with approval by Mr. Justice Lurton, for the Circuit Court of

Appeals of the Sixth Circuit, 95 Fed. 505, is a case in which creditors' bills had been filed against the defendant railroad company, a consolidated corporation under the laws of Illinois, Indiana and Ohio, for the appointment of receivers to take charge and operate a railroad in three jurisdictions. Various creditors of the company filed intervening petitions, among them the owners of certain bonds issued by the company and secured by a mortgage on its property. Subsequently the trustee under the mortgage filed a foreclosure bill and an order was made consolidating the creditors' suit and the foreclosure suit. Thereafter in the creditors' suit intervening petitions were filed attacking, among other things, the validity of the bonds and a motion was made to dismiss the foreclosure bill for want of jurisdiction, on the ground that the necessary diversity of citizenship between the complainants and the defendant, as shown on the face of the bill, did not exist. Judge Taft in denying the motion on page 645 says:

> "* * * The foreclosure bill stated the fact that the railroad, the mortgage on which was filed to foreclose, was in the hands of this court. That was the jurisdictional fact, and made immaterial the circumstances that one complainant was a citizen of New York and the other of Indiana, and that among the defendants were citizens of Indiana and New York. It cannot be of importance that the bill was apparently filed as an independent bill. If in fact the only way of maintaining jurisdiction of it is as a dependent bill, ancillary to the creditors' action, it is the duty of the court so to treat it, provided it appears, as it does, that it can be maintained as such. ***But care must be taken not to give too much effect to the dependence of one suit on the other for jurisdictional purposes. Such dependence does not***

throw both suits into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. Because the res acquired under the original bill gives ancillary jurisdiction to entertain a dependent bill seeking relief in respect of the res, parties to the original bill are not thereby made parties to the dependent bill. The parties to the original bill have no more right to intervene in the dependent cause than if the court had independent jurisdiction thereof."

Counsel for Petitioners have not cited a federal case and Counsel for Respondents have been unable to find one which holds that, under the federal practice, the filing of a proof of claim in a receivership proceeding makes the claimant a party generally to the original cause for all purposes.

Counsel for Petitioners would minimize the force of Judge Northcott's opinion that Respondents had not made themselves parties to the original cause by presenting their claims to the Special Master, quoting his opinion as saying that the said claims were filed with the Receiver, thereby seeking to differentiate between presenting a claim to a receiver and presenting it to a special master on an order of reference (Petitioners' Brief, 50, 51, 54). That the Circuit Court of Appeals was fully aware that the Proofs of Claim had been presented to the Master is apparent not only from the record but from the opinion (R. 67), wherein the fact is expressly recited. The Court, however, properly makes no distinction between these two methods of presenting claims in a receivership estate and it seems unnecessary to do any more than point out the fact that the distinction is one in which there is no real difference, the mat-

ter of the presentation of the claims being merely a question of mechanics which different courts apply according to their practice or the circumstances of the particular case. In the Youtsey case, the claim had been referred to a special master. In other cases cited by Judge Northcott the claims had been presented to the receiver. As will be observed from the previous quotations from *Clark on Receivers*, the writer, in discussing the difference between the effect of the presentation of claims in a receivership proceeding and intervention in the original cause, makes no distinction between filing the claim with a receiver and presenting it to a special master.

Petitioners in commenting on the cases cited by Judge Northcott, in support of the proposition enunciated in this branch of the argument, attempt to distinguish *Elkins v. First National Bank, Acme White Lead & Color Works v. Republic Motor Truck Co., Jones & Laughlin v. Sands and Sands v. Greeley Co., supra*, on the ground that in each of these cases the question resolves itself into merely a question of procedure. While the question of jurisdiction was not directly involved in these cases, they are directly in point. The question at Bar is whether Respondents being required, at the risk of forfeiting their rights, to comply with the invitation and order of court and present their claims in the Receivership proceeding, by so doing became parties to the original cause and thereby gave the Court jurisdiction over them to adjudicate the causes of action *thereafter* brought against them by the so-called Ancillary Bill. The cases cited are pertinent because they define in law the status of one who files a claim with a receiver or special master in a federal equity receivership and hold that by so doing he does not become a party generally to the cause but merely a party *pro hac vice*.

Petitioners seek to minimize the effect of *Youtsey v. Hoffman,* 108 Fed. 693, discussed in the opinion of Judge Northcott, on the ground that the decision of that case rested on the theory that receivers are not parties. On the question of parties the case holds (pp. 695 and 696) that Hoffman

> "by proving and filing his claims before the commissioner of that court, had become, as to them, at least a *quasi* party to that suit; but, as the receiver in the case—the mere officer of the court—was not then a party to the suit, it is clear that the permission given to him to file an answer and set-off in a suit to which he was not previously made a party was altogther unauthorized and irregular."

It appears in the earlier part of the opinion that the permission of the receiver to file his so-called answer and set-off had been granted without notice to Hoffman. The opinion further holds (p. 696) that

> "as there were new and distinct claims stated and set up in the so-called answer and set-off of the receiver, which had no connection with Hoffman's claims, due process of law manifestly required that actual notice, in the way of a service of a summons, should be given to Hoffman, in order to bring him before the court upon that pleading."

So in the case at Bar while the Receivers of Tower Hill had power and were under duty to appear before the Special Master to object to the allowance of the questionable claims presented to the Special Master and to defend the same on behalf of the corporation, they did not thereby become parties to the original cause any more than did the Respondents become parties thereto by filing their proofs of claim. Counsel for Respondents have never conceded, as Petitioners claim, that the

Receivers of Tower Hill were parties to the original cause and are unable to find in the record any support for the claim that they have been so recognized by the Circuit Court of Appeals. Nor does the *Youtsey* case hold, as Petitioners contend, that the claims attempted to be set off by the receiver were under the Kentucky Statutes not counter-claims or set-offs. The Court merely holds that there was no authority under the Kentucky Statutes for permitting a receiver as such and without being made a party defendant to a suit to file a counter-claim or set-off, of which the other parties to the cause of action were required to take notice without the regular service of process. The Court in its opinion on page 696 says:

> "There does not, indeed, appear to be anything in the Civil Code of Practice of Kentucky which makes or expressly authorizes the making of the court's receiver as party to the cause as a litigant therein, and certainly there is no authority in the Code for permitting the receiver, merely as such, and without in fact being made a party defendant, to file a counter-claim or set-off, of which other parties to the cause are required to take notice without a regular service of process thereon. He may, of course, as already shown, sue in his own name, in bringing any plenary action of his own, but no one except an actual party defendant can file a set-off."

The decision on this branch of the case could have been sustained, we submit, without the necessity of referring to the Civil Code of Kentucky.

Counsel for Petitioners would also minimize the authority of *Whelan v. Enterprise Trans. Co.*, 164 Fed. 95. They say (Petitioners' Brief, 52): "The court

there declined to follow *Peck v. Elliott, supra,* because the counter-claim was a legal one and not cognizable in equity."

While Lowell, J., held that the receiver's action against Paige was one cognizable at law, it is manifest from a reading of this opinion that the question whether the receiver's claim against Paige was cognizable at law or in equity was deemed immaterial, and that the real question at issue was whether Paige was right in his contention that by presenting his claim in the court of equity which had appointed the receiver he had not thereby brought himself within the jurisdiction of that court, for the purpose of the collection of the receiver's claim against him. The court in its opinion (p. 454) says:

> "The court has next to consider if the fact that Paige filed a claim against the estate in the hands of a receiver appointed by a court of equity brings him within the jurisdiction of that court of equity for the purpose of the collection of the receiver's claim against him. That Paige cannot obtain as matter of right a jury trial concerning his claim against the estate may be admitted, but from this it does not follow that he waives his right to a jury trial in case of a claim brought by the receiver against him, where that claim is made, not by way of set-off, but for the purpose of taking money out of Paige's pocket. Upon the whole, I think that Paige is right in this contention also" (pp. 98 and 99).

If, as Judge Taft says, parties to an original bill are not thereby made parties to a dependent bill and have no more right to intervene in a dependent cause than if the court had independent jurisdiction thereof, it must follow that parties to a dependent or ancillary

proceeding, such as claimants appearing before a special master in a receivership, do not thereby become parties to the original cause much less do they become parties to another dependent or ancillary proceeding growing out of the original cause, particularly to a bill which though called "ancillary" is in reality an original bill.

In every federal court in which the question has been discussed it has been held that the presentation of claims in a receivership proceeding does not make the claimant a party to the cause.

In bankruptcy proceedings where the powers of the referee with respect to the adjudication of claims are very similar to those of a special master in a receivership proceeding such as this (the powers of the referee being limited by Statute, those of the master by the order of reference under the Federal Equity Rules), it has been held that, notwithstanding a creditor has filed a proof of claim in a bankruptcy proceeding, the court is without jurisdiction in said proceeding to enter a personal decree against him over his objection and further that the trustee cannot take advantage of the filing of a proof of claim as a consent to the jurisdiction of the court in a separate suit brought by the trustee against the claimant.

In *Fitch v. Richardson,* 147 Fed. 197 (C. C. A. First), we quote the following from the *syllabus*:

> "A court of bankruptcy, on rejection of proof of a claim on the ground that the creditor held security therefor, is without jurisdiction to value the security and enter a decree against a creditor over his objection for its excess value over the debt, although he claimed the security as his own property."

In *Tate v. Brinser,* 226 Fed. 878 (D. C. Pa.), a suit in equity by a trustee of the bankrupt estate against the defendant was dismissed for want of jurisdiction, over the trustee's contention that the District court has acquired jurisdiction over the defendant by virtue of the fact that he had filed a proof of claim against the bankrupt estate and attempted to vote the same. The following language from the opinion is particularly applicable to the case at bar, for there as here the defendant had filed a proof of claim *before* he was confronted with any action by the trustee. The court in its opinion on page 883 says:

> "And it cannot be said that the proof of claims against a bankrupt and the voting or attempting to vote them amounts to consent under section 23, subdivision (b) * * * *When these claims were proven and attempted to be voted, Brinser was not confronted with any such action.* There was no such action. The moment he was confronted with the action he promptly challenged the jurisdiction and has persisted in that challenge ever since. The court being without authority to take jurisdiction in this matter and being equally satisfied that the conduct of Brinser in proving his claim in bankruptcy does not amount to consent of jurisdiction, the bill must be dismissed."

(4) Respondents by Filing Their Proofs of Claim in the Receivership Proceedings Have Not Waived Their Personal Privilege Under Section 51 of the Judicial Code.

(a) *Nature of the Privilege.*

Since Respondents were not parties to the Primary Cause and did not become parties thereto by filing their proofs of claim, since the so-called Ancillary Bill is in reality an original bill and since Respondents in the Motions filed by them to vacate the Order of Court entered February 19, 1934, in the Primary Cause and to dismiss the so-called Ancillary Bill of Complaint filed in the Ancillary Cause exercised their privilege under Section 51 of the Judicial Code to be sued in the district whereof they are inhabitants on the claims alleged in the said Bill, the propriety of the decrees of the Circuit Court of Appeals would seem so obvious as to require no further argument. This Court has repeatedly held that the right of a defendant to be sued in his own district in any civil suit is absolute. *Munter v. Weil Corset Co.*, 271 U. S. at 279, 67 L. Ed. 654; *Pacific Mutual Life Ins. Co. v. Tompkins*, (C. C. A. 4th), 101 Fed. 539 (cert. den. 179 U. S. 683).

The privilege of a non-resident defendant to be sued in the district whereof he is an inhabitant is a personal privilege which he may exercise or waive at his election. If he waives the same, such waiver must arise out of some act or thing done by him which evidences his clear intention to submit himself to the jurisdiction of the court wherein the suit is brought, such as a general appearance, a plea to the merits, or some other unequivocal act by which he consents to an adjudication by the Court of the merits of the suit wherein he is named defendant.

Citizens S. & T. Co. v. I. C. R. R. Co., 205 U. S. 46, 51 L. Ed. 703.

Big Vein Coal Co. of W. Va. v. Read, 229 U. S. 31, 57 L. Ed. 1053.

Butterworth v. Hill et al., 114 U. S. 128, 29 L. Ed. 119.

Camp v. Gress, 250 U. S. 308, 63 L. Ed. 997.

Grable v. Killits (C. C. A. 6th), 282 Fed. 185, 195.

Dahlgren v. Pierce (C. C. A. 6th), 263 Fed. 841, 846.

Stonega C. & C. Co. v. L. & N. R. Co., 139 Fed. 271 (C. C. W. D., Va.).

Pacific M. L. Ins. Co. v. Tompkins, 101 Fed. 539 (C. C. A. 4th Cir.).

Fulton v. Ramsey, 67 W. Va. 321, 66 S. E. 381.

Petitioners would have this Court hold that Respondents have waived service of process of the so-called Ancillary Bill of Complaint on the theory that Respondents, prior to the institution of the suit, had already submitted themselves to the jurisdiction of the District Court to hear and determine the issues raised therein, because they, on the "invitation" of the Court and under penalty of forfeiting their claims, had filed proofs thereof with the Special Master in a proceeding before him in aid of the Primary Cause. They would extend Respondents' appearance before the Special Master *pro hac vice* to a *general appearance* in the District Court *in any and all cases Petitioners might see fit thereafter to bring against them.* They would make the filing of the proofs of claim before the Master operate as a *blanket waiver* of Respondents' privilege to immunity from service of process before they knew that they might at some future date be placed in a position where they should avail themselves of that right. We submit that Respondents may not be so lightly divested of their right and that

this Court will look with no more favor than did the Courts below on Petitioners' contention.

(b) *Respondents Have Not Waived Their Privilege.*

Petitioners contend Respondents have waived their personal privilege because, they say, Respondents voluntarily invoked the jurisdiction of the District Court to adjudicate the claims which they presented before the Special Master and that, therefore, their position is precisely the same as one who voluntarily selects a forum and files a bill in equity. The weakness of this argument and the vice inherent in it is effectively pointed out in the opinion of Judge Northcott. We quote from his opinion (R. 71, 72) the following:

> "It is argued that the court has jurisdiction of the parties to pass upon the matters set up in the ancillary bill, because it is said that a claimant, by filing claims with a receiver and invoking the jurisdiction of the court for the adjudication of that claim, consents that the court adjudicate any claim which the receiver may have against him. The case is said to be analogous to a suit in equity in which the complainant, by filing the suit against the defendant, impliedly consents to being sued by way of counterclaim in a court which would not otherwise have jurisdiction of the cause of action therein asserted. See Equity Rule 30; *Texas Co. v. Borne Scrymser Co.* (C. C. A., 4th), 68 Fed. (2d) 104; and *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430, in the last of which the Supreme Court said: *'The setting up of a counterclaim against one already in a court of his own choosing is very different, in respect to venue, from hailing him into that court.'*

"One filing a claim with a receiver, however, is in a very different position from one who has filed a bill in equity. He is not in a court of his own choosing, but in a court selected by others, which has taken into its possession the only property from which he can obtain payment of his claim. The complainant who files a bill in equity, and thus subjects himself to equitable counterclaims of the defendant, has had the option of going into either the state or federal courts and of suing in any district in which jurisdiction of the defendant can be obtained. The claimant who files claim with a receiver, on the other hand, has had no option whatever. Unless he promptly files his claim with the court which has taken jurisdiction of the property, his right to share in the distribution of that property will be gone; and that court passes upon his claim, without regard (fol. 84) to citizenship, the amount involved, or other jurisdictional requirements, merely because of the necessity arising out of the fact that it has taken possession of property. The claimant in such case files his claim in the receivership suit in order that he may obtain his equitable portion of the property in receivership upon its distribution by the court; and, as we said in a former opinion herein, he makes himself a party to the cause *pro hac vice*, *i. e.*, merely for the purpose of having his claim allowed and of sharing in the distribution of the property in which he claims an interest because of the receivership. He has an equitable interest in the property which is in the hands of the receiver; and his position, in so far as coming into the receivership suit for the assertion of his rights is concerned, is more nearly analogous to that of a person whose property has been attached, and who must appear and defend for the

protection of his interest in the property, than to that of a complainant who has voluntarily gone into a court and filed a bill in equity. To permit the receiver to assert in the receivership suit an independent cause of action at law or in equity against such claimant, or to recover on a counterclaim against him merely because he has filed his claim in the receivership suit, would be as unfair as to permit a plaintiff in an attachment suit to amend his complaint to allege a new and different cause of action against a defendant in attachment, or to permit a non-resident, who has appeared to defend a suit on one cause of action, to be subjected while in the jurisdiction to suit on another and independent cause of action. It is well settled that, in an attachment suit, it is not permissible to amend the pleadings to set up a new cause of action (*6 C. J.* 482), and that one who comes into the jurisdiction of a court for the protection of his interest in litigation there pending is immune from service of process in another suit. *Page Co. v. McDonald,* 261 U. S. 446; *Stewart v. Ramsey,* 242 U. S. 128."

Petitioners contend "Whether Respondents would go in or stay out of the District Court was purely volitional. If it be said that they would have stayed out at the risk of losing their claims, the answer is that they would have been in no different position than any other suitor." (Petitioners' Brief 54). For the Court to so hold however, as Judge Northcott points out, would be patently unfair and unjust, for Respondents did not appear in a court of their own choosing but because they had no option in the matter. They must either present their claims in the receivership proceeding or forfeit the same. They were not "actors" or movants as they did not take the initiative at any time in any of the pro-

ceedings. They were defending, not prosecuting, their claimed rights. There is no difference in principle or effect between the condition of one notified to appear and show a right claimed by him or forfeit it and that of one duly summoned to appear and defend an action or suit against him under penalty of judgment or decree by default. A voluntary plaintiff may have a narrow choice in respect of a forum, but he has some choice. Respondents had none.

Furthermore the Respondents presented their claims on "the invitation" of the Court and for its "information" and guidance in the proper distribution of the proceeds of the assets in its custody, in compliance with an order which warned them that if they failed to present their claims before the Master, they would be barred from thereafter asserting the same. The privilege exercised in this instance was not one asserted by claimants but one which the court itself had extended to them and which this Court, in most impressive language, has declared shall not be taken advantage of for the purpose of oppressing or harassing the one to whom it is extended.

Stewart v. Ramsey, 242 U. S. 128, 61 L. Ed. 192, is particularly applicable to the case at bar. In that case this Court, in holding that suitors, as well as witnesses, who come from another state or jurisdiction are exempt from service of civil process while in attendance upon court, speaking through Mr. Justice Pitney (pp. 129, *et seq.*) says:

> "A leading authority in the state courts is *Halsey v. Stewart*, 4 N. J. L. 366, decided in the New Jersey supreme court nearly one hundred years ago, upon the following reasoning: 'Courts of justice ought everywhere to be open, accessible, free from

interruption, *and to cast a perfect protection around every man who necessarily approaches them.* The citizen in every claim of right which he exhibits, and every defense which he is obliged to make, should be permitted to approach them, not only without subjecting himself to evil, but even free from the fear of molestation or hindrance. * * * It is often matter of great importance to the citizen, to prevent the institution and prosecution of a suit in any court, at a distance from his home and his means of defense; and the fear that a suit may be commenced there by summons will as effectually prevent his approach as if a *capias* might be served upon him.' * * *

The opinion (p. 130) quotes with approval the following language from *Parker v. Hotchkiss* (1849) 1 Wall Jr. 269, Fed. Case No. 10739:

'The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify. Witnesses would be chary of coming within our jurisdiction, and would be exposed to dangerous influences, if they might be punished with a lawsuit for displeasing parties by their testimony; and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defense, if they were liable to be visited on the instant with writs from the defeated party.' "Since this decision, the

Federal circuit and district courts have consistently sustained the privilege."

In *Read v. Neff, et al.;* 207 Fed. 890, (D. C. S. D. Iowa), the Court (page 891), says:

"This court is open to all litigants who can make averment of jurisdictional facts. He had the perfect right to come to this court and look after his case, aid in the management thereof, and give his testimony. This is not denied. *But it is contended that, if he did elect to come, he must come with a club over his head, terrorizing both him and all other litigants of like position. This is unsound and utterly at variance with the undoubted right of all such litigants to personally present their case, either alone or with the aid of lawyers. And, if litigants coming from another state come at the peril of being sued, many would not come.* And this is true whether such litigant is to be sued on a just cause of action or is to be sued in vexatious litigation without merit."

(c) *Discussion of Authorities Cited by Petitioners.*

Counsel, for Petitioners, in support of their contention, that the inerrant test of what constitutes a general appearance is whether one has become an actor in the cause, have cited certain authorities, an analysis of which discloses that the case cited is one in which the particular act of the defendant, of which advantage was sought to be taken as constituting a general appearance was held not to be such; or one in which the defendant had filed a counter-claim which he was not bound to plead; or had otherwise affirmatively invoked the jurisdiction of the Court in the *particular* suit which he was defending.

In *Wabash Western Ry. Co. v. Brown,* 164 U. S. 271, 278, 41 L. Ed. 431, 434, this Court held that the filing of a petition for removal did not amount to a general appearance but to a special appearance only.

In *Merchants Heat & Light Co. v. James B. Clow & Sons,* 204 U. S. 286, 51 L. Ed. 488, the question at issue was whether in an action at law a defendant, a foreign corporation, had waived its right to question the jurisdiction of the court, on the ground that the service upon it was invalid, when in its answer on the merits, and after it had saved its right to question the court's jurisdiction, it went further and it set up a demand in recoupment which it was not bound to plead. The case has no analogy to those at Bar.

Petitioners while claiming that case "is identic in principle with that of the one at Bar", yet point out the fundamental difference between the cases. In their discussion of the case (Petitioners' Brief p. 21) they say "the lone respect in which the case * * * differs from the one at Bar is that in the former the defendant was not bound to plead the counter-claim, while here the Respondents if they elected to enforce their claims were bound to come into the District Court". In that case this court speaking through the late Mr. Justice Holmes whom Petitioners quote (Petitioners' Brief p. 20) says "* * * the authorities agree that he (defendant) is not concluded by the judgment if he does not plead his cross demand and that whether he shall do so or not *is left wholly to his choice*". In the cases at bar Respondents admittedly had no choice but to prove their claims, otherwise they would have been barred from thereafter asserting the same. By what process of reasoning can it be said that they, in the words of Justice Holmes, thereby became actors *"in a proper*

sense" when they submitted their claims in the receivership proceeding.

In *Fisher v. Shropshire,* 147 U. S. 133, 37 L. Ed. 109, a bill in equity to enforce a vendor's lien was removed from the state into the federal court by the defendant who, having done so, contended that the latter court had no jurisdiction because another party was an indispensable party defendant and was a citizen of the same state as the complainants. The Court held, in the language quoted in Petitioners' Brief (p. 20) that, having voluntarily invoked the jurisdiction of the court he could not thereafter deprive it thereof.

Commercial Electric Supply Co. v. Curtis, 288 Fed. 657 (C. C. A. 8th) was a case of intervention where the intervenor who had made himself party plaintiff in the particular case was held bound by all of the decrees entered in that case thereafter and does not decide any of the questions now before the Court.

In *Rouse v. Letcher,* 156 U. S. 47, 39 L. Ed. 341, Letcher filed an intervening petition against the Receivers of a Railroad company, in a suit for the foreclosure of a mortgage on the railroad, to recover damages for alleged negligence of the company's employees. Her petition was granted, her case was referred to a special master who reported a judgment in her favor against the receivers. It had no bearing on the case at Bar.

Stewart v. Dunham, 115 U. S. 61, sustains Respondents' proposition that the presentation of a claim before a special master in receivership proceedings does not make the claimant a party to the litigation.

The pertinent facts and the Court's opinion thereon (page 64) are as follows:

> "The appellants assign as error, that the court proceeded to decree, after admitting Katz and Barnett and John I. Adams & Co., as co-complainants, alleging that, as the case then stood, it was without jurisdiction, as the controversy did not appear to be wholly between citizens of different States. This, of course, could have furnished no objection to the removal of the cause from the State court, because at the time these parties had not been admitted to the cause; and their introduction afterwards as co-complainants did not oust the jurisdiction of the court, already lawfully acquired, between the original parties. The right of the court to proceed to decree between the appellants and the new parties did not depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. *If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing.*"

The Court in the last sentence of the foregoing paragraph plainly says that had the creditors, instead of

intervening, filed their claims before the special master, they would *not have become parties to the suit* and no question of jurisdiction could have arisen. Reasoning from that premise, it holds that after the court had once acquired jurisdiction on the ground of diversity of citizenship, in the exercise of its jurisdiction it can *incidentally* decree in favor of all other creditors coming in *under* the bill, but that this proceeding is an ancillary one, and creditors so coming in *do not thereby become parties to the original bill* and thus divest the court of jurisdiction.

Massachusetts Bonding and Insurance Co. v. Concrete Steel Bridge Co., 37 Fed. (2nd) 695, is an action at law, the facts in which have not the remotest similarity to those in the cases at Bar. The case holds that the State Auditor of West Virginia, having an official residence in the Southern District of West Virginia, was authorized to accept service of process on a foreign corporation issued from the District Court of the Northern District in a case where all other jurisdictional requirements had been met under the West Virginia Code. It further appears that, after appearing specially to question the Court's jurisdiction, the defendant answered and pleaded to the merits.

In *Dailey Motor Co. v. Reaves*, 184 N. C. 260, 114 S. E. 175, 176, the excerpts from the opinion quoted by Petitioners obviously shows that the Court's statement that "If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general" is confined to the Court's jurisdiction to hear and decide the *particular* controversy in which the appearance is entered.

In *Fulton v. Ramsey,* 67 W. Va. 321 (66 S. E. 381), it is apparent from a reading of the opinion that all that the Court was deciding was the effect of an appearance in the *particular* case before the court. The Court there says:

> "It must be an appearance for a purpose *in the cause, not merely one collateral to it.* The test according to *Merchants H. & L. Co. v. Clow & Sons,* 204 U. S. 286, is whether the defendant became an actor *in the cause. Citizens Sav. & Tr. Co. v. R. R. Co.,* 205 U. S. 46. * * * *The appearance must have some relation to the merits of the controversy.*"

In *Newman v. Moore,* 94 Ky, 147, a married woman in conjunction with her husband covenanted to convey land to one Lowe. A part of the purchase price was paid in cash, and the balance in notes, which came into the hands of one Newman. Thereupon she put the purchaser in possession but refused to convey title. On a bill in equity filed against her by the vendee, Newman filed a cross petition to recover on his notes. She insisted that, as she had not been summoned on Newman's cross petition, he was not entitled to any relief against her. The court, however, says:

> "But she filed exceptions in open court to the Commissioner's report fixing the amount coming to Newman, which were sustained by the Court, and as she thus took part in the trial and by her exceptions combatted the claim set up in Newman's objections she cannot be allowed to say she was not in court. * * * We think she thereby entered her appearance."

In *Hartford Accident Indemnity Co. v. Southern Pacific Co.,* 273 U. S. 207, 71 L. Ed. 612, this Court on a writ of certiorari affirmed the Circuit Court of Appeals

affirming the judgment of the District Court denying a petition for liability in an admiralty proceeding arising in the District Court. The quotation from the opinion cited as to the general power of a court of equity which has obtained jurisdiction over some portion of a controversy to decide the whole issue and award complete relief is not controverted, but the case has no analogy to the one at Bar and the question in venue is not involved.

Petitioners have also cited certain West Virginia authorities which, they say, hold that creditors by filing their claims before a commissioner appointed in a suit to hear and report on claims makes the claimants parties to the main cause and amenable to the jurisdiction of the court in all other litigation growing out of the said main cause.

In answer thereto, Respondents submit that the practice in the federal courts is controlled by the Federal Judicial Code and the Equity Rules promulgated by this Court and that the decisions of the Supreme Court of West Virginia interpreting the statutes of that State relative to practice and procedure in the state courts are not authoritative.

However, in not one of the West Virginia cases cited does the Supreme Court of West Virginia say that *affirmative* relief can be obtained against the creditor filing his claim before a commissioner in proceedings on a creditor's bill without the issuance of an original process.

Further discussion of these cases may be found in the Appendix hereto.

(5) Equity Rule 30 Has No Bearing on the Question Involved in the Cases at Bar.

Petitioners seek to sustain the jurisdiction of the District Court to adjudicate the claims set up in the so-called ancillary bill of complaint without service of process thereof upon the Respondents by resorting to Equity Rule 30. Petitioners' entire argument upon this point is summed up in the following quotation from Petitioners' Brief (pages 31 & 32):

> "Since Respondents, by assertion of their claims in the receivership proceeding, are seeking affirmative relief against the *res*, their demands, without regard to the form in which they are cast, *are in essence bills in equity against Tower Hill*, and the Ancillary Bill, notwithstanding its form, *is likewise in essence an answer* setting up counterclaims, which, although they might have been the basis of an *independent bill*, are still within the express terms of Equity Rule 30."

Unless this Court should hold that the Circuit Court of Appeals committed error in holding that under the federal practice a person does not by filing a claim with a receiver make himself a party to the original cause and that by such action he enters a general appearance not only in said cause but in any and all other suits which the receivers may thereafter see fit to institute against him in said court, we submit that Equity Rule 30 has no application to the cases at bar. For in any other event the sole purpose of invoking the said Rule would be to defeat the express provisions of Section 51 of the Judicial Code and the rights asserted thereunder by the non-resident Respondents. And as was said by Mr. Justice Butler in *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430, 434, 77 L. Ed. 408, 412, "Rule

30 is without force as against conflicting statutory provisions."

In *Washington Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U. S. 629, 635; 68 L. Ed. 480, 483, Mr. Justice Brandeis says:—

> "But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity, or of admiralty. It is true of rules of practice prescribed by this court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred."

A complete answer to Petitioners' contention that the proofs of claim filed in the ancillary cause before the Special Master is in essence a bill in equity filed in an original cause is contained in the excerpt from Judge Northcott's Opinion quoted above (pp. 41-43).

The same argument that denies the contention that parties filing their proofs of claim with a receiver or before a master or upon a reference make themselves parties to the original cause also refutes the contention that the claims are in essence bills in equity.

A reference to a master for the purpose of determining the application of the proceeds realized upon the winding up of a corporation is merely a part and only a part of the process of execution of the final decree in the original suit, and the filing of claims which must be filed to preserve the claimant's rights, whether his claims are legal or equitable, presents no analogy to the bringing of a suit in equity by the suitor in the forum of his choice. The claimants are brought into the pro-

ceeding in a forum, not of their selection, for a special and limited purpose, upon penalty of forfeiting their claims for non-appearance. They are compelled to prosecute such claims in a court of equity without regard to whether their claims be legal or equitable in their nature. They have no choice either in respect of forum or procedure. To sustain Petitioners' contention, would be to make the rule an instrument for perpetrating an injustice, whereas it is clear that the said rule, as well as all other Equity Rules, was merely intended to simplify and make uniform Equity Pleading and Practice.

Petitioners contend; and it apparently also ran in the mind of Judge Soper in his dissenting opinion, that to treat the proofs of claim as bills in equity and the ancillary bill of complaint as an answer and counter-claim thereto would be to further the ends of simplification and promote the orderly administration of the estate in receivership. That such is far from the case a moment's reflection and consideration of the Rule itself will show.

Rule 30 must be read in connection with Rule 25 and succeeding rules. Rule 30 confines itself to prescribing the nature of the answer to the bill in equity, the form of which is prescribed in Rule 25. The second paragraph of Rule 30 requires the defendant to state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit. It further permits the defendant, without cross-bill, to set up any counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and provides that such set-off or counter-claim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross-claims.

It is obvious that the Rule is confined to prescribing the form and contents of an answer and counter-claim filed to an original bill in equity where the bill and answer form part of one and the same suit. It does not go to the length of prescribing, either in express terms or by implication, that where there is an original cause, wherein receivers have been appointed and growing out of which, there is an ancillary proceeding wherein proofs of claim have been presented to a special master, a bill of complaint filed as ancillary to the original cause which sets up new and original causes of action, shall be treated as an answer and counter-claim to the proofs of claim filed in said other ancillary proceeding. Had it been intended that claims filed could be treated as original bills and that a new and original bill could be treated as an answer and counter-claim, surely such practice would have been definitely so provided. Of course we believe that it would not be reasonable to assume that such would have been the intention of the Court, for the result of such practice would be to throw all proceedings of this nature into hotchpot and thereby sanction the practice which was criticised by former Chief Justice Taft in his opinion in the case of *Continental Trust Co. v. Toledo, St. L. and K. C. R. Co.*, 82 Fed. 642. (This Brief pp. 30-32).

We further submit that the application of Rule 30 contended for by Petitioners, rather than tending to simplification would result in confusion. In the cases at bar, five separate and independent claims have been presented by Respondents. The bill of complaint which Petitioners would treat as an answer and counter-claim joins all the Respondents as defendants. It presents four separate causes of action, none of which are common to all of the defendants named. Watson, Hillman and Sheets are alleged to be involved in all and each

Respondent corporation in one only. Nowhere does the bill aver sufficient grounds for uniting all of these causes of actions in one bill.

To hold that said proofs of claim are bills in equity and to permit the bill of complaint to be treated as an answer and counter-claim thereto would seem to be in direct violation of Equity Rule 26 which *inter alia* provides:

> "When there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice."

The authorities which Petitioners cite in support of the statement (Petitioners' Brief 33) "that the counter-claims against Respondents were asserted by Receivers in the form of an Ancillary Bill instead of by Answers to Respondents' claims is not a sufficient reason for refusal to apply the provisions of Equity Rule 30" are, we submit, inapplicable to the proceedings before this Court.

In *Young Co. v. McNeal-Edwards Co.*, 283 U. S. 398, 75 L. Ed. 1140, both the plaintiff and defendant, under the Massachusetts law, had voluntarily invoked the jurisdiction of the same court to adjudicate their particular claims one against the other. The respective controversies arose out of the same transaction between the parties each of whom was in a court of its own choosing.

Chicago & N. W. R. Co. v. Lindell, 281 U. S. 14, 74 L. Ed. 670 and *Partridge v. Phoenix Mut. L. Ins. Co.*,

15 Wall, 573, 21 L. Ed. 229, both sustain the right of a defendant in a suit to plead therein a set-off or counter-claim to avoid circuity of action.

Soper, J., in his dissenting opinion, appears to have been influenced by the fact that he conceived that the application of Equity Rule 30 would promote a speedy liquidation of the estate. He said (R. 76):

> "Indeed, in cases of receivership, there is an added reason to that which led the Supreme Court to promulgate Equity Rule No. 30. When an estate is being wound up by a receiver under the supervision of a court of equity, there is more involved than the right of any claimant; and controversies between the receiver and the claimants should be adjudicated expeditiously, so that the estate may be speedily liquidated and all the creditors may receive their proportionate shares."

In answer thereto, we submit that no court in its desire to have a receivership estate speedily liquidated can equitably or legally sacrifice the rights of an individual claimant under an Act of Congress (Sec. 51 of the Judicial Code). Furthermore we would point out—

(1) That the prompt and orderly administration of an equity receivership is not impeded by the necessity of resorting to a court of competent jurisdiction for prosecuting claims of the receivers against others. In any case the defendant is entitled to his day in court and the case takes its course without regard to the administration of the receivership. Particularly is this true if the defendant has the right to a trial by jury.

(2) In the cases at bar the Circuit Court of Appeals has made adequate provision that the orderly administration of the receivership may be effected and

that the rights of all the parties interested therein be preserved by modifying the decrees of the District Court and decreeing that the Ancillary Bill be treated as a petition to stay action on the claims of the Respondents pending the adjudication of the counter-claims of the Petitioners in a court of competent jurisdiction.

(3) The record shows that on March 30, 1930, more than five years ago, proceedings ancillary to the original cause were commenced in the United States District Court for the Western District of Pennsylvania, of which District all of the Respondents are residents and inhabitants. If Petitioners had conceived that there was any pressing necessity for expediting the causes of action alleged against the Respondents in their bill of complaint, it would seem reasonable to suppose that they would forthwith upon their appointment as ancillary receivers have brought suits thereon in Pennsylvania. Or the prosecution of the claims might have been expedited if, when Respondents' motions in these causes were sustained by the District Court, Petitioners had immediately instituted suit in Pennsylvania instead of appealing from the decrees of said Court to the Circuit Court of Appeals and from thence to this Court.

(6) Comments on Petitioners' Contention That All Claims Asserted in the So-called Ancillary Bill Are Cognizable in Equity.

A decision of the question whether the alleged causes of action contained in the Bill, or any of them, constitute grounds of actions at law or are cognizable in equity, is not necessary to the decision of the fundamental question involved which, as we have heretofore pointed out, is one of venue. After the Circuit Court of Appeals had held that Respondents had not become

parties to the original cause by presenting proofs of claim to the special master, that the so-called ancillary bill was an original bill requiring service of process and that one filing a claim with a receiver does not thereby consent that the court adjudicate any claim which the Receiver may have against him, the opinion (R. 72) contains the following:

> "In so far as the matters set up in the ancillary bill constitute causes of action at law, there is an additional reason why they may not be asserted in the receivership suit. That suit is a proceeding in equity; and the claims filed by claimant and any counterclaims thereto would neccessarily be heard in equity. The claimants, by filing their claims in a court of equity, waive their right of jury trial with respect to the claims filed, but they do not waive such right with (fol. 83) respect to independent claims against them which the receivers may seek to assert by way of counterclaim. It is well settled that a counterclaim involving a cause of action at law cannot be asserted in a suit in equity, because of the right of the party against whom it is asserted to a jury trial under the Seventh Amendment to the Constitution. *American Mills Co. v. American Surety Co.*, 260 U. S. 360; *Sinclair Refining Co. v. Midland Oil Co.* (C. C. A., 4th), 55 Fed. (2d) 42, 47."

Petitioners thereupon in their petitions to this Court for Writs of Certiorari challenged said statement with the assertion that every counterclaim set up in the Bill of Complaint against the Respondents is clearly cognizable in equity. Respondents submit that the Circuit Court of Appeals committed no error in the statement above quoted and, in support thereof, submit the following:

(a) *Discussion of facts alleged in the so-called Ancillary Bill and Relief Prayed for.*

As appears from the Bill, while each of the Proofs of Claim of the Respondents (an analysis of which appears in the Counter-Statement of Facts) is a claim *ex contractu*, each of the alleged causes of action against the Respondents is an action *ex dilecto* and each prayer in connection therewith is for the payment of moneys either had or received, or for damages occasioned by the alleged wrongful acts of the several Respondents. While accountings are asked for on each cause of action, no prayers for discovery are sought in aid of such accountings nor is discovery averred to be essential and in none of the causes of action do the transactions complained of involve mutual accounts between the parties. No specific property is sought to be recovered. The Bill contains no injunction prayers, no allegation that the Bill is brought to avoid a multiplicity of suits nor does it show any other facts which, with the possible exception of those hereinafter mentioned, warrant equitable relief. The several causes of action are not common to all of the Respondents. While the individual Respondents are alleged to be answerable on all of the said causes of action, each of the corporate Respondents is involved only in one particular cause of action alleged against it. While it appears that the individual Respondents, as officers and minority directors of Tower Hill and its former subsidiaries, occupied a *quasi* fiduciary relation thereto, there are no allegations in the Bill upon which to base such a fiduciary or *quasi* fiduciary connection of either corporate Respondent with Tower Hill or its said subsidiaries. The Bill alleges that "the majority of the directors of Hecla and Tower Hill of Pennsylvania were the same persons and Hecla, through its control of Fayette Investment Company, and thereby of Thompson-

Connellsville Coke Company, was the owner of the majority of the capital stock of Tower Hill, which in turn owned all of the capital stock of Tower Hill of Pennsylvania" (R. 52). An averment that A through its control of B, through B's control of C, through C's control of D is the owner of the majority stock of D is, we submit, a mere conclusion of law in the absence of showing the amount of the capital stock outstanding in B, C and D, respectively, and the extent of the stock owned by A in B, by B in C and by C in D, and is not sufficient to charge A with being the majority owner of the stock of D. That the majority of the directors in each of the said Companies was the same does not of itself make Hecla a majority stockholder in either Tower Hill or Tower Hill of Pennsylvania.

(b) *Discussion of Law.*

Petitioners' contention that all of the causes of action alleged in the Bill of Complaint are cognizable in equity is based on the sole premise that each and every Respondent is a fiduciary or *quasi* fiduciary. No distinction is made between the individual and the corporate Respondents.

In the case of each of the corporate Respondents, the cause of action, if an equitable one, must be sustained on other grounds than that of a breach of trust by a fiduciary.

The claim against Hecla reduces itself to one for money damages in a liquidated sum arising out of an alleged tort committed by Hecla, in being able through the medium of Hillman to cause Tower Hill to convey certain coal lands in exchange for an alleged coal plant which Tower Hill was compelled to operate at a loss. It would seem clear that Judge Northcott's

remarks are pertinent to the claim against Hecla and that the action there is exclusively one at law to recover money damages.

The claim against Hillman Company stripped of the verbiage which surrounds it amounts to nothing more than a claim that the Hillman Company charged Tower Hill with unreasonable sums of money for certain expense incurred by Hillman Company in the management and supervision of Tower Hill, keeping its books and selling its output. There is no allegation in the Bill that the Petitioners, to whom the books of Tower Hill were turned over, do not know the exact sums charged to Tower Hill and the exact amounts received by Tower Hill for the sale of its products. If the Petitioners believe these amounts to be excessive, no accounting is required involving any of the other corporations referred to in the Bill, and it seems clear that the action is nothing more than an action at law to recover the difference between the amounts charged and a reasonable sum.

In the claims against the individual Respondents, the Petitioners have invoked the jurisdiction of equity, on the ground that the Respondents as fiduciaries have been guilty of breaches of trust in the management of Tower Hill and its said subsidiaries.

Petitioners cite authorities on the general proposition that whenever there has been a breach of trust committed by a fiduciary, equity jurisdiction attaches, and it may be true that a number of cases from the various State Courts are to the effect that directors or other officers may be sued in equity, as well as at law, for a wilful breach of trust or for actionable negligence, irrespective of whether there is an adequate remedy at law.

Counsel for Respondents, however, have been unable to find a case decided by this Court and Counsel for Petitioners do not cite one which specifically holds that equity jurisdiction attaches where the plaintiff has an adequate remedy at law in the form of money damages for alleged wrong committed by a fiduciary and the bill contains no other averments which show necessity for equitable relief.

On the other hand, this Court in a long line of authorities has held that under the Seventh Amendment to the Constitution and Section 267 of the United States Judicial Code (U. S. C. A. Tit. 28, Sec. 384), suits in equity are prohibited in any Court of the United States where a plain, adequate and complete remedy may be had at law. *Buzard v. Houston,* 119 U. S. 347 at 351; *Scott v. Neely,* 140 U. S. 106 at 110, 35 L. Ed. 358; *United States v. Bitter Root Development Co.,* 200 U. S. 451, 472. 50 L. Ed. 550. 560: *Equitable Life Assur. Soc. v. Brown,* 213 U. S. 25, 53 L. Ed. 682; *Curriden v. Middleton,* 232 U. S. 633 at 636, 58 L. Ed. 765, 767; *Schoenthal v. Irving Trust Co.,* 287 U. S. 92 at 94 and 95, 77 L. Ed. 185, at 187 and 188.

In *Schoenthal v. Irving Trust Co.,* 287 U. S. 92, 95 77 L. Ed. 185, 185, Justice Butler says:—

> "The question whether remedy must be by action at law or may be pursued in equity notwithstanding objection by defendant depends upon the facts stated in the bill. And, in absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained. (Citing cases)."

In cases of alleged fraud, as under any other head of chancery jurisdiction, a federal court will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages when a like amount can be recovered at law in an action sounding in tort, or for money had and received. *Buzard v. Houston*, 119 U. S. 352; 31 L. Ed. 451.

See also *Parkersburg v. Brown*, 106 U. S. 487, 500; *Ambler v. Choteau*, 107 U. S. 586, 27 L. Ed. 322; *Carey v. McMillan*, (C. C. A. 8th), 289 Fed. 380.

There is considerable federal authority which holds that in a suit against a trustee, whether he be an express trustee or a *quasi* trustee or fiduciary, as a director or officer of a corporation, or an agent, for alleged acts of fraud or negligence, where the relief sought against the individual is one for the payment of moneys generally, and the bill discloses no facts which require an accounting or any other recognized equitable relief, equity has no jurisdiction.

Equitable jurisdiction has been denied:

In suits brought against directors and officers of corporations:

Godfrey v. McConnell (C. C. D. Mont) 151 783;

Corsicana Nat. Bank v. Johnson (C. C. A. 5th), 218 F. 822, approved by C. C. A. of the Ninth Circuit in *Adams et al. v. Clark*, 22 Fed. (2d) 956, but distinguished on other grounds;

Cockrill v. Cooper et al., 86 Fed. 7 (C. C. A. 8th);

Stephens v. Overstoltz (C. C. Mo.) 43 Fed. 771;

Kelley v. Dolan et al., (C. C. A. 3rd), 233 Fed. 635.

In a suit against an agent handling the investment of trust funds:

Parkerson v. Borst, 251 Fed. 242 (C. C. A. 1st).

In suits in bankruptcy to recover preferences on the theory that the party receiving the same is a constructive trustee, see the following:

Adams v. Jones, 11 Fed. (2nd) 759;
Schoenthal v. Irving Trust Co., 287 U. S. 92, 77 L. Ed. 185.

And it is to be noted that even among the authorities cited by Petitioners, such as *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1185, Chief Justice Fuller concludes that portion of the opinion quoted by Petitioners in the Appendix to their Brief, by finding that the facts in that case were such as to require equitable relief, saying on page 481:

> "It may be somewhat doubtful whether an action against these defendants could be maintained at law * * *. The maintenance of this suit enables the whole question between all the parties to be determined therein, and prevents the necessity of any action at law or other proceeding in the courts for the purpose of determining the ultimate and final rights of all the parties to this suit. Such relief cannot be obtained in any one action at law.
>
> "Upon all the facts we think that the jurisdiction of the court was plainly established, because under the circumstances the complainants had no adequate and full remedy at law."

As the alleged causes of action in the cases at Bar are not common to all of the Respondents and as there is plain, adequate and complete remedy at law as against

each, it would seem that Judge Northcott's opinion would apply to the individual, as well as to the corporate Respondents and that their right of trial by jury in a Court of law should be preserved.

If this Court should hold that the said causes of action, or any of them, are cognizable at law, it is submitted that the omitted portion of the opinion of Chief Justice Taft in *American Mills Co. v. American Surety Co. of New York*, 260 U. S. 360, 67 L. Ed. 306, from which Petitioners have quoted (Petitioners' Brief p. 30) in their effort to show that Equity Rule 30 should be invoked in this case and which holds that the said Rule was not intended to change in any respect the line of demarcation between law and equity, as drawn between the Federal statutes and decisions, is particularly applicable.

In the following quotation from the opinion of Chief Justice Taft, we give in italics the omitted portion of the paragraph which is indicated by asterisks in petitioners' brief, (364, 309):

> "The new Equity Rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence, and by uniting in one action as many issues as could conveniently be disposed of. *But they normally deal with subjects-matter of which, under the dual system of law and equity, courts of equity can properly take cognizance. They certainly were not drawn to change in any respect the line between law and equity as made by the Federal statutes, practice, and decisions when the rules were promulgated. By the construction which petitioner would put upon Rule 30, it is an attempt to compel one who has a cause of action at law to bring it into*

a court of equity and then try it without a jury whenever the defendant in that cause can find some head of equity jurisdiction under which he can apply for equitable relief in respect of the subject-matter. The order of procedure, as between the law and equity sides in such cases, always has been that the equity issue is first disposed of by the chancellor, and then, unless that ends the litigation, the original plaintiff may have his action at law and his trial by jury secured him by the 7th Amendment of the Constitution. Liberty Oil Co. v. Condon Nat. Bank, decided November 26, 1922 (260 U. S. 235, ante, 232, 43 Sup. Ct. Rep. 118). Petitioner's construction of Rule No. 30 would deny the successful defendant in the equity action this right. Petitioner seeks to avoid the dilemma by the suggestion that the rule would be satisfied by merely pleading the action at law without proving it; but this would be futile."

However, as we have heretofore pointed out, the question here at issue is one of venue, a decision of which does not require a determination of the question whether the alleged claims against Respondents are cognizable at law or in equity.

Wherefore Respondents respectfully submit that the Circuit Court of Appeals for the Fourth Circuit has committed no error in its decrees modifying the decrees of the District Court for the Southern District of West Virginia, and that said decrees should be affirmed.

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APPENDIX.

The practice in bringing creditors' bills in equity to enforce judgment and to subject lands of the defendant to the payment of liens thereon, of reference to a Special Commissioner to hear and adjudicate claims against the defendant and of priorities had been in use in Virginia long prior to the separation of Virginia and West Virginia and at the time of the filing of the opinion in *Arnold v. Casner,* 22 W. Va. 444, if not before the filing of the petition on which the decision was rendered, had become the statutory law of the State. *Barnes West Virginia Code Annotated* (1923) c. 139, Sec. 7, citing Acts of 1872, c. 30; 1882 c. 126. But neither in the Statutes nor in the West Virginia Decisions cited by plaintiffs is there anything which purports to extend the powers of the Commissioners in Chancery beyond adjudicating the following matters, viz.:

(a) What property was owned by the debtor;

(b) The amounts of the various creditors' claims against the debtor's property;

(c) Priority of said claims as between themselves.

Within these limitations he would have full and complete jurisdiction. Beyond these limitations, the procedure does not go. The power to obtain affirmative relief in creditors' bills is not specifically conferred and therefore does not exist.

Neither in *Arnold v. Casner, supra,* nor in any other of the West Virginia cases cited was an attempt made to subject a creditor to a suit for the recovery of a money judgment against him involving new issues not litigated in the original creditors' bill or to claim that service of

process on him could be dispensed with because he was already a party to the litigation by virtue of having previously presented a claim before a commissioner appointed to pass on and adjudicate the claims and priorities thereof under a creditors' bill. *Arnold v. Casner* merely involves the right of a purchaser of the lands of a decedent which were subject to the lien of the decedent's debts to be made a party to a proceeding in which the debts had been ascertained and liquidated by a commissioner appointed for that purpose seven years after the petitioner had purchased the property and had himself paid a number of the claims. The petitioner claimed the right to intervene and reopen the case on the ground that the creditors whose claims had been presented to the Commissioner were not parties to the proceeding. Of course, this could not be done and all the Court holds is that the creditors, including the petitioner himself, who had notice of the proceeding and who had proved their claims thereby became bound by the "proceedings in the cause" as fully as the most formal parties.

Bilmyer v. Sherman, 23 W. Va. 656 and *Wyatt v. Smith,* 25 W. Va. 813 are both cases in which the facts are very similar to those in *Arnold v. Casner, supra,* and arose on creditors' bills to subject the real estate of the defendant to the payment of lien debts, and hold that under the West Virginia Equity Practice creditors, although not named as parties to the Bill, who present their claims are as effectually bound by the adjudication of their claims and the decree *in rem* distributing the assets in the hands of the Court as though they were formal parties to the proceedings.

Bent v. Read, 82 W. Va. 680, is also a creditors' suit to subject land to the payment of creditors' liens thereon and in this case the Court not only comments on

Arnold v. Casner, supra, but holds that creditors, whether named in the Bill or not "become parties *only in the general sense that they may come in and prove their claims* and without other pleadings become for all the purposes of the decree parties plaintiff," the Court saying:

> "We do not understand that the general proposition is controverted that under our statute Sec. 7, Chapt. 139, Code, and the decisions of this court, in relation thereto, that from the time of entry of an order of reference in such suit convening the creditors all creditors whether named in the bill or not become parties in the *general sense* that they may come in and prove their claims, and without other pleadings become for all purposes of the decree parties plaintiff, and that they may not after such suit brought begin and prosecute any other suit for the same purpose on penalty of being enjoined therefrom and compelled to come into the original suit and therein assert their rights. This proposition is affirmed in *Arnold v. Casner,* 22 W. Va. 444, and other cases. Such being the law as provided by statute and adjudged in the decisions cited, it follows that as to all judgments claimed by appellants, which were proved by them or their privies,—and decreed as liens they must be regarded for the purposes of this suit as having been parties plaintiff in that suit for they could not have been defendants therein."

It is submitted that the language employed in the foregoing cause goes no further than to enunciate a well settled rule in the administration of the estate of a decedent or of property in the hands of a receiver or assignee, viz., that the presentation of a claim of a creditor gives the creditor the same standing as though he

were a party to the proceeding *only so far as adjudication of his and other claims against the estate are concerned,* and if, on presentation of his claim, it is disallowed, he is fully bound by the decision as though he were a formal party thereto.

SUPREME COURT OF THE UNITED STATES.

Nos. 15 and 16.—October Term, 1935.

A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers, etc., Petitioners,
vs.
J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 9, 1935.]

Mr. Justice Butler delivered the opinion of the Court.

The controversies here involved arise in a suit in equity brought November 3, 1924, in the federal court for the southern district of West Virginia by the Piedmont Coal Company, a Pennsylvania corporation, and three persons, inhabitants of Pennsylvania, against the Tower Hill Connellsville Coke Company of West Virginia, a corporation organized under the laws of that State. The plaintiffs own 4,000 common and 10,850 preferred shares of its stock. August 25, 1932, the court entered a decree that defendant's business be wound up and its properties converted into money and distributed to its creditors and shareholders, appointed petitioners receivers, and directed a special master to state an account and to report to the court all claims against defendant. Respondents have presented claims. Petitioners oppose their demands and by counterclaims ask affirmative relief.

The questions, as put by them, are:

1. When a claimant appears before a master in a federal receivership proceeding and proves a claim to share in the distribution of the receivership res, does he submit himself to the jurisdiction of the receivership court for the adjudication of his liability to the res, when the counterclaim asserted against him by the receiver is of a nature cognizable in equity and its adjudication is essential to a final disposition of the receivership proceeding?

2. Is not the adjudication of the counterclaim against the claimant and the determination of the whole controversy within the purpose and intendment of Equity Rule 30?

The Tower Hill Connellsville Coke Company, a Pennsylvania corporation, operated coal mines and coke plants.* The West Virginia Tower Hill, by issue of its stock to the stockholders of the Pennsylvania Tower Hill, acquired all the share capital of the latter and until January 8, 1930, was merely a holding company owning only that stock. In April, 1920, Thompson Connellsville Coke Company, a Pennsylvania corporation, purchased a majority, about 28,000 shares, of the common stock of the West Virginia Tower Hill. Respondent Hillman, an inhabitant of Pennsylvania, was president of and controlled the purchasing company. Respondents Sheets and Watson of that State were also its officers. Hillman became president and Sheets and Watson became officers of both Tower Hill companies. In June, 1920, the Eastern Coke Company was organized under Pennsylvania law; Hillman became its president and Sheets and Watson were given other offices. They caused the Pennsylvania Tower Hill to subscribe for 51% of the common shares, and later it acquired the rest. The three individual respondents were also directors of the Tower Hill companies, the Eastern Company and the two corporate respondents, the Hillman Coal & Coke Company and the Hecla Coal & Coke Company. Hillman, with the other two acting under his direction, dominated these five corporations. The corporations maintained joint general offices and joint sales, operating and engineering departments.

The preferred stock of the West Virginia Tower Hill was, in preference to the common, entitled to cumulative dividends at the annual rate of $6 per share and, upon distribution of assets, par plus unpaid dividends. In 1924 the company paid $9, leaving then accumulated $97.50 per share. No other dividend has been paid. The stockholders' bill alleged that, ever since Hillman took control, the Pennsylvania Tower Hill had sufficient resources to pay a dividend out of which the West Virginia Tower Hill could make a payment on account of its own preferred stock but that the directors of the former fraudulently refused to declare any dividend, and that it was intended to exhaust the resources of both companies

*The facts prior to the appointment of the special master are derived from the records of earlier litigation in this suit that were filed in this court with petitions for certiorari. 280 U. S. 607. 290 U. S. 675. We take judicial notice of them. National Fire Ins. Co. v. Thompson, 281 U. S. 331, 336, and cases cited.

without paying anything to stockholders of the latter. It prayed the appointment of receivers empowered to take the shares of Pennsylvania Tower Hill and vote them at meetings of the company's stockholders and to demand that it declare dividends, to procure appointment of ancillary receivers in Pennsylvania and, if found necessary, to bring suits there.

Defendant's answer denied the fraud charged. The court found plaintiffs entitled to relief and that the Pennsylvania Tower Hill had sufficient funds to pay $20 per share on defendant's preferred stock. It declared that, if the companies failed within 30 days to take steps to do this, receivers would be appointed and given appropriate authority. Then, defendant moved to dismiss the suit for want of indispensable parties asserted to be: its common stockholders including the Thompson company, the Pennsylvania Tower Hill, and defendant's directors, all citizens of Pennsylvania. In support of the motion, defendant alleged that the directors were the actors in all the transactions of which the bill complained. Making any inhabitant of Pennsylvania a party would destroy diversity of citizenship and oust jurisdiction. *Salem Co.* v. *Manufacturers' Co.*, 264 U. S. 182, 189. The court refused to entertain the motion and, since no steps were taken to pay the dividend, appointed receivers and authorized them substantially as prayed.

Defendant appealed. The Circuit Court of Appeals, July 8, 1929, found that the holders of defendant's preferred stock had been subjected to treatment that amounted to fraud in law and that enough had been shown to require the appointment of receivers with power to bring in the courts in Pennsylvania all actions necessary to protect plaintiffs' rights. It held that for the appointment of receivers, with power so limited, the West Virginia Tower Hill was the only necessary party. 33 F. (2d) 703. This court having denied defendant's petition for certiorari (280 U. S. 607) the district court made its decree conform to the mandate of the Circuit Court of Appeals. The district court for western Pennsylvania appointed ancillary receivers with authority to sue the Pennsylvania Tower Hill, its officers and directors to obtain transfer by that company of property and money to the defendant. But, after the decision of the Circuit Court of Appeals and while its mandate was stayed pending decision by this court upon petition for certiorari, the individual respondents caused several transfers to be made: Pennsylvania Tower Hill traded coal

lands for a mine of Redstone Coal & Coke Company. Eastern Coke Company conveyed all its assets to Pennsylvania Tower Hill. And the latter transferred all its property to defendant.

Then plaintiffs by an amended and supplemental bill prayed that defendant be dissolved and that receivers be appointed to distribute its assets to creditors and stockholders. The relief was sought upon the ground that the purpose of the transfers had been to prevent inquiry into the management of the Tower Hill companies; great losses were endangering security for preferred stock liability, and the purposes for which the defendant was organized had failed. Almost immediately after knowledge of plaintiffs' purpose to file that bill, defendant paid $1,184,000 for 11,840 shares of the Emerald Coal & Coke Company. Plaintiffs then filed a second amended and supplemental bill. After answer and trial, the district court, in accordance with the plaintiffs' allegations and proofs, found: The purpose of the transfer of assets from Pennsylvania Tower Hill to defendant was to prevent the receivers from securing any relief. Defendant's assets had so decreased as to imperil its preferred shares and their value might disappear in the near future. And, August 25, 1932, it entered a decree substantially as prayed.

The Circuit Court of Appeals affirmed. 64 F. (2d) 817. It held:

None of the transactions occurring since its first decision has been to the advantage of the Tower Hill companies. The purchase of the Emerald stock was definitely harmful. Assets are hardly more than enough to pay preferred stockholders. To continue the business would allow those in control, who have shown utter disregard of rights of preferred stockholders, to speculate further at their risk alone. Transfer of assets by the Pennsylvania Tower Hill to defendant rendered futile and useless anything the receivers might do in Pennsylvania and was made for that purpose. There was no lack of indispensable parties. This court denied certiorari. 290 U. S. 675.

Respondents' claims were verified and presented at a hearing before the master January 30, 1934. Hillman and Sheets claim the value of $105,000 in government bonds furnished by them to obtain supersedeas on defendant's appeal from the decree of August 25, 1932. Watson claims $33,750. This is for salary as defendant's secretary, and for services as counsel for defendant in the main suit and for the Pennsylvania Tower Hill in tax matters.

The Hecla company claims as owner of preferred and common shares of defendant. The Hillman company claims $2,720.03, alleged to have been paid for account of defendant in adjustment of expenses of the companies having joint offices.

February 19, 1934, the receivers filed an ancillary bill. It asserts four counterclaims. The first is for large sums that under the guise of salaries the individual respondents took from the Tower Hill and Eastern companies. The amounts so withdrawn were wholly disproportionate to the value of services rendered. The second is for $1,184,000 that, for the advantage and benefit of Hillman personally, they caused defendant to pay for the shares of Emerald company. The third is for money that they, through and for the Hillman company, caused to be taken from the Tower Hill and Eastern companies under pretense of apportionment of joint expenses. The fourth is for $356,000, the value of land of the Pennsylvania Tower Hill that they, for the benefit of the Hecla company, caused to be transferred to the Redstone company in exchange for the coal mine, and claim is made for additional sums paid for taxes and improvements upon the latter. The facts alleged amount to charges that the disbursement of moneys and transfer of property complained of were directed to be made by the individual respondents in bad faith and in violation of duties that as officers and directors they owed to the three companies and their stockholders and were misappropriations of the assets of these corporations.

The bill alleges that the claims presented by respondents cannot be adjudicated without consideration of the claims that the receivers assert against them and that the adjudication of both groups of claims in one proceeding is necessary for the effectual enforcement of the principal decree. It prays: that Hillman, Sheets and Watson be required to pay the amounts that they took under the guise of salaries and, upon return to them of the shares of the Emerald company, the amount they caused defendant to pay therefor; that they and the Hillman company pay the money taken on the pretended division of expenses; and that they and the Hecla company, upon return of the property received in exchange, pay the value of the coal lands handed over by Pennsylvania Tower Hill to the Redstone company, together with the net amounts expended by the Tower Hill companies upon the first mentioned property.

The court's order granting leave to file the ancillary bill directed that it be given a separate number and that it be ancillary to the main suit, required defendants to move to dismiss or to answer within a specified time, directed receivers to mail to respondents at Pittsburg, and to deliver at the office in West Virginia of defendant's counsel in the main suit, a copy of the order and of the ancillary bill. This having been done, respondents appeared specially and moved to vacate the order and to quash the service on the ground that none of them was within the jurisdiction but that each was an inhabitant of Pennsylvania within the purview of § 51, Judicial Code, 28 U. S. C., § 112.

The court dismissed the bill for want of jurisdiction over the persons of respondents. By a memorandum filed with the order, the district judge indicated that he was of opinion that the respondents, by presenting their claims and appearing before the master, had become parties for all purposes but that, if he were to so hold, the suit would have to be tried before the question of jurisdiction could be finally decided, and that therefore he would grant the motion to dismiss so that the receivers might appeal and have the question settled in advance of trial. The Circuit Court of Appeals, one of the judges dissenting, held that the district court was without jurisdiction of respondents to adjudicate the counterclaims or to grant any affirmative relief. It did have jurisdiction to pass on any defense, legal or equitable, which might be asserted against respondents' claims, and to stay action thereon until the counterclaims could be elsewhere adjudicated "so that they could be set off against the claims, or the amounts payable thereunder, as might be proper". The district court should have retained the ancillary bill, "treating it as a petition to stay action on the claims . . . and as setting up defenses . . . where the matters alleged could be considered as purely matters of defense as distinguished from counterclaims". The court modified the decree and remanded the case for proceedings in accordance with the opinion. 75 F. (2d) 451. This court granted certiorari. — U. S. —.

The subject matter of the main suit is the right of plaintiffs, being stockholders of defendant, to have its business wound up, and its assets collected and distributed among its creditors and stockholders. That the district court had jurisdiction to enter that de-

cree has been finally adjudged. 64 F. (2d) 817. The receivers are the court's representatives and are entitled to have all the property belonging to defendant, and upon leave, may sue to recover any part of the res. The controversies before us arise between respondents who come to share therein and the receivers who not only put in issue the validity of respondents' claims but allege that they have and refuse to account for a portion of the assets. Undoubtedly the court has jurisdiction of the subject matter, i. e. the claims and counterclaims. *White* v. *Ewing*, 159 U. S. 36. *Pope* v. *Louisville, New Albany &c. Railway*, 173 U. S. 573, 577. *Peck* v. *Elliott*, 79 Fed. 10.

We come to the question whether the court has jurisdiction of the persons of respondents in respect of the counterclaims.

They were not parties to the controversy resulting in the decree winding up defendant's affairs. The court has issued no process against them. The delivery of copies of the order and bill in accordance with the court's direction did not make them parties. But petitioners insist that by presenting their claims respondents submitted themselves to the jurisdiction of the court to grant affirmative relief on the causes of action alleged against them. Respondents contend that in the last analysis the issue is one of venue. They say: The ancillary bill is an original one commencing a suit to which they, being inhabitants of Pennsylvania, cannot be made parties by the service of process. The proving of claims before the special master did not make them parties to the original cause and they have not thereby waived the privilege conferred by § 51 of the Judicial Code.

Respondents appropriately presented their claims and became entitled to adjudication without petition for intervention, any formal pleading or commencement of suit. Unquestionably, they submitted themselves to the court's jurisdiction in respect of all defenses that might be made by the receivers and of all objections that other claimants might interpose to the validity, amounts or priorities of their claims. And they put themselves in position, should their interest warrant, to challenge the receivers' acts and the demands of others claiming as creditors. *Stewart* v. *Dunham*, 115 U. S. 61, 64. *Elkins* v. *First Nat. Bank*, 43 F. (2d) 777, 779. *Continental Trust Co.* v. *Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642, 647. *Jones & Laughlin* v. *Sands*, 79 Fed. 913. *Gasquet* v. *Fidelity*

Trust & Safety Vault Co., 57 Fed. 80, 83. *Acme White Lead & Color Works* v. *Republic Motor T. Co.*, 285 Fed. 88, 90. And see *Youtsey* v. *Hoffman*, 108 Fed. 693, 695.

The ancillary bill is not an original bill for the commencement of a suit. That it was not so intended is shown by the fact that process was not prayed or issued. While in form not inappropriate for commencement of suit, it was in fact formulated and filed to serve as a pleading in the main suit to put respondents to proof of their claims and to assert the right to affirmative relief. Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all the parties before them. See Story, Equity Jurisprudence, 14th ed., § 28.

All trusts, those implied as well as those expressly created, are within the jurisdiction of courts of equity. The doctrine of trusts is deemed to be "the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience; and it has been extended so as to embrace not only lands, but chattels, funds of every kind, things in action, and moneys." *Clews* v. *Jamieson*, 182 U. S. 461, 479. Pomeroy, Equity Jurisprudence, 4th ed., § 151. It is to be understood from the allegations of the ancillary bill that the individual respondents as officers and directors so dominated the corporate owners that they had and exerted full power over all the corporate property and transactions. Causes of action arising from transgressions of officers and directors of corporations such as those on which the receivers rest their counterclaims are cognizable in equity for the reason that the receivers have no adequate remedy at law and also because respondents, as it is alleged, fraudulently obtained defendant's property and therefore cannot in equity and good conscience retain it. See Pomeroy, §§ 155, 157. *Cockrill* v. *Cooper*, 86 Fed. 7, 13, *et seq.* And, so far as concerns the matters in controversy here, the individual respondents are to be dealt with just as if they were technically trustees for creditors and stockholders. *Koehler* v. *Black River Falls Iron Company*, 2 Bl. 715, 720-721. *Jackson* v. *Ludeling*, 21 Wall. 616, 624, 631. *Wardell* v. *Railroad Co.*, 103 U. S. 651, 658-659. *Briggs* v. *Spaulding*, 141 U. S. 132, 147. *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 599. The allegations of the.

ancillary bill make it appear that the corporate respondents were so under control of the individual respondents as to be merely their tools for carrying out the transactions culminating in the misappropriations charged. It results therefore that all the claims asserted against respondents may be dealt with in equity.

The rule contained in § 51, Judicial Code, 28 U. S. C., § 112, that is invoked by respondents here declares: "... no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant ..." The section applies only where a suit is "brought ... by any original process or proceeding ..." No attempt was made to summon respondents into court. That provision does not affect the general jurisdiction of district courts but merely confers a personal privilege that may be waived. *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 272. *Lee* v. *Chesapeake & Ohio Ry.*, 260 U. S. 653, 655. By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance, § 51 to the contrary notwithstanding. See *General Elec. Co.* v. *Marvel Co.*, 287 U. S. 430, 435.

Petitioners invoke a provision of our Equity Rule 30: "The defendant by his answer shall set out ... his defense to each claim asserted in the bill ... The answer must state ... any counterclaim arising out of the transaction which is the subject-matter of the suit, and may ... set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him ...". It may not be said that, by presenting their claims, respondents commenced a suit and so brought that provision into play. The rule does not purport to cover, and was not prescribed for, situations such as that here presented. *Chandler & Price Co.* v. *Brandtjen & Kluge, Inc.*, 296 U. S. —, —. But the omission so to extend the rule gives rise to no implication that receivers may not assert and enforce, against those who appear and demand part of the res, counterclaims for portions of the receivership estate that they wrongfully took and still withhold. The right of the receivers to have affirmative relief in the receivership court is supported by the same, or at least similar and equally strong, reasons as those that constitute the foundation of the rule. Cf. *Amer. Mills Co.* v. *Amer. Surety Co.*,

260 U. S. 360, 365. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 609.

Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief. Pomeroy, §§ 181, 231. *United States* v. *Union Pacific Railway*, 160 U. S. 1, 52. *Camp* v. *Boyd*, 229 U. S. 530, 551-552. *McGowan* v. *Parish*, 237 U. S. 285, 296. *Greene* v. *Louis. & Interurban R. R. Co.*, 244 U. S. 499, 520. Cf. *Hartford Accident Co.* v. *Sou. Pacific*, 273 U. S. 207, 217-218. Distribution may not be made without decision upon the counterclaims. Nothing is more clearly a part of the subject matter of the main suit than recovery of all that to the res belongs. *Gasquet* v. *Fidelity Trust & Safety Vault Co., supra*, 83-84. *Peck* v. *Elliott, supra*. *Hollander* v. *Heaslip*, 222 Fed. 808, 811.

The Circuit Court of Appeals rightly held that the district court has jurisdiction to pass on all defenses against respondents' claims, but erred in holding it to be without jurisdiction to grant affirmative relief. The decision permits the court to pass upon the receivers' rights of recoupment and set-off up to the amount of respondents' claims but, without regard to what they are entitled to have, prevents that court from giving them judgment against respondents. That limitation may be assumed to be in harmony with the rule governing recoupment and set-off that formerly was strictly applied. Cf. *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252, 258. *Merchants Heat & L. Co.* v. *Clow*, 204 U. S. 286, 289-290. But, contrary to the rule that equity will decree complete relief, the prescribed restrictions prevent appropriate adaptation of equity to the circumstances of cases. It requires the receivers to split their causes of action. While permitted to seek enforcement of so much of their claims as are "purely defensive", they would be compelled to go to another court to recover the rest. The splitting required extends even to separate items that go to

make up a single cause of action; e, g., the items constituting the claim based upon respondents' apportionment of expenses. And if the receivership court has jurisdiction of respondents in respect of only so much of the receivers' counterclaims as are strictly defensive, then its determinations as to those parts would not be binding as to the rest. *Portland Wood Pipe Co.* v. *Slick Bros. Const. Co.*, 222 Fed. 528. The decision may be construed to direct the receivership court to stay all proceedings on respondents' claims until final judgment may be obtained in suits brought elsewhere upon the causes of action asserted by the receivers. That would introduce additional elements of uncertainty and would involve unnecessary delay, work and expense. As the individual respondents dominated the defendant and the other corporations used to effect the alleged misappropriations and also directed defendant's part in this litigation, it would seem that necessarily most of the issues in respect of the counterclaims will be quite similar to those litigated in the main suit. Unquestionably, all matters in the controversies between the parties may be tried and determined more conveniently and promptly in the receivership court than elsewhere.

It is clear that, under the circumstances disclosed, the restrictions laid by the Circuit Court of Appeals upon the receivership court are not consistent with that freedom as to procedure that necessarily belongs to courts of equity administering receiverships. See *Portland Wood Pipe Co.* v. *Slick Bros. Const. Co., supra.* Its decree will be reversed and the case remanded to the district court with directions to proceed in accordance with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.